

WHAT IS *FAIR TRADE*?

An Investigation into the Ethical Foundations of a Multifaceted Debate

Thesis

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To my parents & to Loïc, my son.

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Introduction

After the collapse of the former Soviet Union and with it of socialism and its model of a centrally planned economy around 1989, the model of neo-liberal free market economy was left without competition and went about completing its global victory. Global free trade, so the neo-liberal credo, would lead to development and eventually to increased standards of living for all. The corresponding economic and political norms deeply influenced international conventions and international economic institutions like the World Trade Organization (WTO) and the World Bank and came to shape their agenda and the means to its realization. This and the massive technological developments of the last decades paved the way for a globalization of trade on a formerly unthinkable scale. The whole world became potential markets and production areas.

The main actors of this economic globalization were large multinational enterprises (MNEs) that made use of the new possibilities to increase their profits by shifting production to developing countries with lower labor costs, to expand their markets, and to take over more and more smaller firms. After a few decades of operating with their new global supply chains and markets, the biggest MNEs' turnover nowadays is higher than the BPI of entire states (Young / Welford 2002).

As predicted by economic theory, many profited from these developments, among them the MNEs and the consumers in the industrialized states who were able to further increase their living standard, but also many inhabitants of developing countries where the average living standard and life expectancy increased over time.¹ However, despite the promises of economic theory, a vast part of the world's population continues to live in desperate poverty. Critical voices soon grew louder claiming that the WTO's and the World Bank's policy of forcing developing countries to open their markets – allegedly for their own good – were actually detrimental for them, harming the world's poorest even further instead of bettering their lot. The industrialized states were accused of using just the kind of protectionist measures which they prohibited to developing countries to protect their own interests. Besides, the outsourcing of production to low-wage countries often went along with bad working conditions and high risk at the bottom of the supply chains, as well as with ecological and social degradation (Nicholls/Opal 2005, 56). MNEs were blamed for exploiting workers in their global supply chains since working conditions in developing countries are often appallingly bad, human right abuses are widespread, wages often insufficient for subsistence, and the safety and health of workers are often put in jeopardy. While industrialized countries had found legal and social policy means to regulate their domestic markets and soften the effects for the losers of the free market economy, economic globalization is not accompanied by effective global governance thereof, and there are no institutions that soften the effects for the losers of the globalized free market.

But the outsourcing of production to low-wage countries affected workers in industrialized

¹ Cf. <https://www.imf.org/external/np/exr/ib/2000/041200to.htm#chart1b>.

countries as well since, as a consequence, many of them lost their jobs, which in turn led to widespread criticism, among others from worker unions.

On the background of the above issues, global trade is attacked from various sides and in many different ways as being unfair. Public concern with these and related issues regarding the perceived unfairness of global trade sparked a number of debates and developments. On the level of the world trading system, especially after the WTO-summit and the respective civil unrest in Seattle of 1999, the institutional workings of the WTO were criticized as unfair on the grounds of favoring the interests of industrialized countries over those of developing countries, and demands were voiced regarding institutional reform (e.g. Oxfam 2000). On the level of trade policies of states, debates about the justification of government subsidies raised fairness issues. On the level of MNEs and their global supply chains, criticism of exploitation and unfair trade led activists to starting the Alternative Trade movement, which set about establishing a parallel trade system focused on better conditions and returns for workers and producers in developing countries. Out of this developed the Fair Trade movement, a growing activist and consumer movement whose main actors are local and international organizations that import goods produced according to the criteria of the Fair Trade movement, and organizations which monitor the fulfillment of these criteria and certify the according products with a Fair Trade label.² At the same time, the growing pressure on MNEs to assume more responsibility for their global supply chains sparked corresponding debates within the fields of business ethics and corporate social responsibility (CSR) and led MNEs to adopt CSR policies.³ Lately, debates and demands regarding “living wages” have become more and more important in NGO and public discourse, and corresponding initiatives have been gaining momentum.⁴ Last but not least, questions regarding the moral duties of the consumers themselves, who have tremendous collective power seeing as the end point of global supply chains, have given rise to the field of consumer ethics with its questions regarding the responsibility and duties of the individual consumer (c.f. e.g. Harrison et al. 2005; Schwartz 2010).

In all these areas questions related to fair trade are being discussed. With regard to *what* exactly is unfair with respect to current global trade, we find many different answers, among them the

² We will engage with the Fair Trade movement’s understanding of *fair trade* in Part II. A short introduction into the movement’s structure and history can be found in Appendix I.

³ This concern an additional important topic that lies outside of the scope of this thesis: the problem that, notoriously, contrary to working national jurisdictions, in the international realm of global trade there is no accountability and security of a functioning rule of law. Crimes committed in the context of global trade go mostly unpunished. The well-known reason for this is that while trade is globalized, jurisdiction is still mainly national. The resulting gap in the law’s ability to deal with international wrongdoing by corporations is known under the heading of “governance gaps” (e.g. Ruggie 2008). “These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.” (ibid.) For more on the topic see Baughen (2014) who offers an extensive analysis of the current legal situation and explores possible solutions in depth

⁴ E.g. the Living Wage Foundation, the Asia Floor Wage Campaign, the Fair Wear Foundation etc.

following⁵: the background conditions of global trade are very unequal; the current global trade system is not sustainable; there are unfair power inequalities between industrialized and developing states in the WTO; the real global market is far from the ideal market of economic theory; government subventions and taxes lead to an un-level playing field; outsourcing production is unfair to domestic workers; product prices don't include ecological and social costs; workers and MNEs have highly unequal bargaining power; people from developing countries often have no free choice as to accepting work contracts; profits of trade are distributed unequally; MNEs exploit workers; the rich profit from the bad situation of the poor; there is no accountability and responsibility in the global economy; the free market system neglects human values; etc. As a matter of fact, it seems we cannot go through these lists and discard some issues out of hand as definitely off topic – they all somehow seem to have a point. This variety of answers impressively illustrates how multifaceted the concepts of *unfair* and *fair global trade* are. How *exactly* the points are related to the concepts of fair and unfair global trade is a fascinating question.

When we look at the existing literature from different fields that use the term “fair trade”, we get a similar picture of highly diverse and contradicting views. Often the respective understanding of “fair trade” is merely implicit, that is, it is not elaborated what exactly the concept is supposed to mean and what normative grounds it is thought to rest on. If there *is* an explicit explanation of the understanding of “fair trade” it is usually the description by FINE which is cited.⁶ This “definition”, which is widely recognized in the organized social Fair Trade movement, reads:

„Fair trade is a trade partnership, based on dialogue, transparency and respect, which seeks greater equity in international trade. It contributes to sustainable development by offering better trade conditions to, and securing the rights of, marginalized producers and workers - especially in the South. Fair trade organizations (backed by consumers) are engaged actively in supporting producers, awareness raising and in campaigning for changes in the rules and practice of conventional international trade.“⁷

The passage offers an informative description of the values and normative goals of the movement – it does not, however, supply a proper definition of the term „fair trade“, and without further elaboration it accordingly doesn't contribute much to understanding the concept and its normative grounds.

The lack of conceptual clarity complicates the debates on the topic and often leads them to missing the actual point of disagreement. The tendency for misunderstandings is further enhanced by

⁵ The following is a collection of answers from students in my workshops on “fair trade”.

⁶ FINE is an informal association of the four major organizations of the Fair Trade movement (FLO, IFAT, NEWS! and EFTA, its name being composed of the first letters of the four organizations). For more on these organizations see Appendix I.

⁷ www.befair.be/site/download.cfm?SAVE=1314&LG=1.

the fact that professionals from a wide variety of fields and with very different perspectives and theoretical backgrounds engage in it: practitioners and activists, politicians, economists, political and moral philosophers etc.

Seeing the conceptual confusion, it is surprising that there is but a hand full of short publications which offer an overview over different positions on fair trade and examine their conceptual and normative bases.⁸ While they offer valuable inputs in this respect, they leave much to be explored, if only for reasons of scope.

Research objectives and structure of the argument

The first intention of my thesis is therefore to fill that gap by providing an overview over the debates on fair trade and bring some much needed clarity into their complex normative foundations. The second aim is to elaborate the basics of an original argument with regard to what fair trade amounts to. The respective line of argument is interwoven with the discussion of the relevant concepts and theories in Part I and the discussion in chapter 7. The focus of this normative project is the question what exactly (if anything) is unfair about MNEs' trading practices within their supply chains, and what fair trade conversely would demand. In particular, I want to examine if and how it is justifiable that living wages are ethically required in the supply chains of MNEs.

Let us look a bit more closely on the topic of this thesis.

The term "fair trade" consists of two components, namely "fair" and "trade". Whereas "trade" is a rather straightforward descriptive term, "fair" is a deeply normative term. "Fair" and its counterpart "unfair" are so-called thick ethical concepts, that is, the normative judgement is *inherent* in the terms themselves: if something is fair this *implies* that it is morally desirable, whereas if something is unfair this implies that it is morally undesirable.

So, while it is quickly explained what is meant by "trade", the crux regarding "fair trade" lies in explaining what is meant by "fairness" – particularly in the context of trade. In other words, we want to figure out what conditions must be met for trade to qualify as fair.

Existing positions on fair trade in the literature and in public discourse make certain claims regarding this question. These claims rely on a certain understanding of the concept of fairness – what I call their conceptual grounds – and on certain related (explicit or implicit) normative arguments, premises and background theories – what I call their normative foundations. To enhance the conceptual clarity and precision of debates on "fair trade" and deepen our understanding of their normative foundations, we first need to gain an in-depth understanding of the normative concepts involved. In the first part of the thesis we will therefore examine the central normative concepts

⁸ Most notably Miller 2010; James 2009; Risse 2007; Risse/Kurjanska 2008; Anderson/Riedel 2006; Boda 2001; Suranovic 2000.

underlying the debates on fair trade and situate them within the relevant theoretical context. Our analysis will start out with a broad understanding of “(un)fairness” and “(un)fair trade”, because people are referring to a *wide variety* of morally problematic issues in the realm of global trade when employing the notion of “unfair trade”. The term “unfair” in this context is often used in a very broad, unspecific way. Similarly, both in public and academic discourse the terms “fair trade”/“unfair trade”, “just trade”/“unjust trade”, and “ethical trade”/“unethical trade” are often used more or less interchangeably, without clear delineation between them (see e.g. Maseland/De Vaal 2002; Suranovic 2000).⁹ Seeing that there is a close relation between them, it is not surprising that the concepts of justice and general morality play an important role in debates under the heading of “fair” trade, the most widely used term of the three. Accordingly, if we want to capture the crucial moral issues in the debates on fair trade it is important not to restrict our understanding of the term “fair trade” to one specific concept at the outset, but rather to start out with a sufficiently broad understanding of the notion that leaves room for several interpretations – including some that, in the process of our analysis, may turn out to be more aptly understood as issues of *just* trade or *ethical* trade. For these reasons I will not only look at the concept of fairness and its relevance for global trade, but also at the concept of justice and some concepts and issues from general ethics (like claims, duties, and responsibility) that are important for questions of fair trade.

At this point, another preliminary remark is called for. While our research interest concerns the question what fair trade amounts to, we are in practice much more often confronted with claims about trade being *unfair* in a certain way than with claims about trade being *fair* for certain reasons.¹⁰ In a similar vein, surveys show that most people have strong moral intuitions when it comes to assessing specific situations as unfair, and they often agree in their assessment (cf. Finkel 2001). However, the precise content of the positive concept of *fairness* is much more difficult to grasp – both for the people in the surveys and for philosophers (cf. Finkel 2001, Carr 2000).

In light of this, we need to clarify how the relation between *unfair* and *fair* will be understood in the following. I will take it that something is *fair (enough)* if and only if it is not *unfair*; in other words, I will understand *fairness* as the *absence of unfairness*. This, or so I think, is also how the relation is usually implicitly conceived. On this background, I assume that *fair trade* can plausibly be understood as *not-unfair trade*, and I will make use of this assumption in approaching the concept of *fair trade*.

Let us now return to the research objectives and structure of the thesis. After having

⁹ In the context of the social Fairtrade movement there exists a technical distinction between “fair trade” and “ethical trade” which defines “fair trade” as “focused on terms of trade with small scale producers”, while “ethical trade” is understood as being concerned with “working conditions in mainstream production” (Barrientos/ Smith 2005, 190). However, these definitions are useful only from a practical-descriptive perspective and will not concern us further.

¹⁰ This is *per se* not a reason for thinking that (current global) trade is probably indeed unfair (unjust/unethical), but is rather due to a specific trait of moral concepts in general and the fairness concept in particular: People usually cry out indignantly “this is unfair!” whereas we hardly ever hear anybody shout “this is fair!” Presumably then, we take it to be the default case that things go right, and as long as everything goes morally “smoothly” there is no need to shout (or talk) about it.

explored the central normative concepts and their theoretical framework in Part I, in Part II we turn to the analysis of the normative foundations of the most common positions on fair trade as found in the literature and in public discourse. The positions I will discuss are the following:

- a) Fair trade is trade the rules of which are determined in a fair way (in criticisms of the WTO negotiations, e.g. Steinberg 2002; Goff 2011)
- b) Fair trade is free trade (economic theory, e.g. Krugman/Obstfeld 2003, and classical moral defenses of the free market, e.g. Smith 1776, Hayek 1944, Buchanan 1975, Nozick 1974, Friedman 1980)
- c) Fair trade is trade that serves the worst off (e.g. Fair Trade Movement, Stiglitz/Charlton 2005)
- d) Fair trade is trade the terms of which ensure reciprocity and impartiality (e.g. GATT/WTO principles)
- e) Fair trade is trade on a level playing field and requires a harmonization of standards (e.g. Zervas 2008, Bhagwati and Hudec 1996)
- f) Fair trade is trade the burdens and benefits of which are distributed fairly (e.g. James 2012)
- g) Fair trade is trade that balances the stringent claims of citizens and foreigners proportionally (e.g. Risse 2007, Risse / Kurjanska 2008)
- h) Fair trade is trade that duly considers or equalizes the interests of workers in the supply chains (e.g. Stakeholder approach, Fair Trade movement, Bhagwati 1996, Koslowski 1996)
- i) Fair trade is trade that distributes the burdens and benefits proportionally throughout the supply chains (e.g. Klein 2010, Starmanns 2010)
- j) Fair trade is trade that is not involved in exploitation (e.g. Fair Trade movement)¹¹

For analytical purposes, these positions will be classified according to four dimensions. The first dimension concerns the levels of analysis to which positions on fair trade can roughly be assigned: positions that concern the fairness of the *world trading system* (level 1), positions that concern the fairness of the *trade policy of states* (level 2), and positions that concern the fairness of *trading within the supply chains of MNEs* (level 3).¹² Corresponding to this distinction, Part II is divided in three chapters, each of which is concerned with one of the three levels of analysis. For reasons specified below, the main focus of this thesis is on level 3, both in terms of scope and depth of analysis.

With regard to each of the positions, I will secondly clarify how “trade” is understood and what “object” the fairness claim is accordingly referring to: the (global) trading system, trade

¹¹ This list of positions on “fair trade” is not thought to be complete or exhaustive. I believe, however, that these are the most prevalent positions on “fair trade” found in the debates.

¹² The level of consumer ethics, which could be conceptualized on a fourth level as asking what fairness demands of consumers, will not be included in the current analysis for reasons of scope.

policy, or economic exchanges.

Third, I will classify positions with regard to the focus of their normative assessment: either on the *background* dimension, the *procedural* dimension, or on the *outcome* dimension of trade. Finally, I will classify positions with regard to their normative grounds as either positions on *ethical trade*, *just trade*, or *fair trade*. These distinctions will be established in detail in Part I.¹³

On top of these classifications, the discussion of each position will be based on the following main questions: a) How can the position be reconstructed in terms of the necessary and/or sufficient conditions it specifies for trade to qualify as fair? b) Who is the subject of the claim's presumed moral duties to ensure fair trade, and what do those duties presumably ask of him? c) What conceptual and normative foundations is the claim based on? And d) How plausible is the claim?

Let me now turn to the second, more specific research objective of the thesis. It consists in determining what exactly (if anything) is unfair about MNEs' trading practices within their supply chains, and what fair trade conversely would demand of them – particularly, I want to examine if and how living wages are a demand of fair trade. The according in-depth discussion in chapter 6 constitutes the normative heart piece of the thesis.

There are several reasons for this focus: First, the level of the supply chains of MNEs is where the Fair Trade movement as the most prominent social context for claims of fair trade is situated (as a counter-system to the one of mainstream trade through MNEs). Presumably due to this, it is the context most present in public debates on fair trade. Second, it is the level which has received the least attention in the literature so far. There is of course literature on business ethics in general and on the responsibility of companies with regard to human rights in particular¹⁴, but there is, to my knowledge, no philosophical examination of the explicit question what demands fair trade makes of MNEs, and on the question if living wages can be justified as a demand of fair trade.

The focus on the supply chains of MNEs might surprise political philosophers, who would generally locate the relevant fairness questions exclusively on the institutional (political) level. So, why do I consider the level of the supply chains of MNEs to be relevant in its own right for questions of fair trade?

There are two reasons for this: First, there might be genuine questions of fairness on the level of trade practices of companies that are not reducible to questions on the political level. As we will see shortly, the concept of fairness is relevant for a vast array of contexts that have nothing to do with political or legal institutions, and it is not clear *prima facie* why this should not also apply to the context of trade within the supply chains of MNEs. Therefore, it cannot simply be *assumed* that there are no fairness questions on that level. If someone wanted to argue for that claim, he would have to analyze potential fairness issues on the level of MNEs supply chains in their own right and then consider if they can actually be “dissolved” into fairness considerations on an

¹³ For a summary on how I conceive the respective concepts see the conclusions at the end of Part I.

¹⁴ Especially Ruggie 2011 and 2013.

institutional level.

Second, whatever the relevance of fairness issues on the level of MNEs' trade practices in an *ideally just world* would be, the question of the fairness of trade practices of transnational companies is highly relevant under current non-ideal conditions. Theories of justice usually aim at providing the principles for the institutions of an ideally just society and a just world. This is important because it tells us what institutions we should be aiming at establishing. However, we nevertheless need principles for the current, non-ideal situation too. In the words of Rawls, these problems "are the pressing and urgent matters (...) that we are faced with in everyday life" (Rawls 1971, 8). In the current situation then, where global institutions guaranteeing global justice or global fair trade are largely absent (as might be claimed), the question of duties of fair trade of MNEs is relevant in its own right.

Let me now outline the course of my own normative argument with regard to the question what fair trade amounts to. Regarding trade among trading actors, in Part I show why approaching fair trade through the concept of just exchange outcomes does not get us as far as we might think (3.8). I also show why the claim that fair trade requires the outcome related fair distribution of burdens and benefits throughout the supply chain (7.3) depends on them qualifying as contexts of genuine cooperation (4.7), which, as I will argue, is bound to fail.

Instead of focusing on the outcomes, I argue that we must focus on the procedural fairness of trade. After investigating different propositions for explications of "fairness" (4) I suggest understanding fairness as requiring *no disadvantaging others and no taking advantage of existing disadvantages*, thereby allowing for relevant aspects of the background dimension into the procedural demands of fairness.

Further, I argue that fairness duties should be understood as a particular kind of duties of special relations with their requirements depending on the context or social practice at hand (4.9).

With regard to fairness in direct interactions I argue that the procedural *voluntariness* requirement is of central relevance, which has consequences for our assessment of trade in the supply chains of MNEs, where it is linked to the concept of exploitation (7.4). With regard to the latter, I argue that, based on the proposed understanding of fairness, the voluntariness requirement has to be understood in a more demanding way, which, as we will see in chapter 7.4, surprisingly brings us back full circle to the outcome dimension of transactions in the sense of particular normative requirements they need to fulfill. As to the question if and in what sense MNEs are responsible for exploitation and other wrongs in their supply chains, I set the stage in Part I by examining the relevant aspects of responsibility in general and David Miller's connection theory of responsibility (2007) in particular (3.4), which I consider very helpful for our context. In Part II I will apply this theory to the question at hand and argue that it gives us weighty reasons to ascribe responsibility to MNEs for wrongs in their supply chains under certain circumstances.

As to fair trade with regard to the global trading system and the trade policy of states, it is mainly fairness or justice regarding the background conditions of trade that is required. In Part I I prepare the ground by showing how assessments of the normative demands on those background conditions depend on the question if we understand the world as a whole as a context of justice or not (3.7). During the examination of existing positions of fair trade on these levels in Part II, I relate them to my understanding of fairness and assess them accordingly. Finally I sum up the conclusions of my analysis.

Part I: Conceptual and Normative Foundations: Trade, Justice, Fairness, and General Ethics

1. Trade

Let us start with a definition of “trade” and related descriptive concepts: trade, or commerce, consists in the exchange of goods or services for money, goods or services between two or more entities, involving the transfer of ownership of the traded goods or services. In the primary sense of the term, trade thus refers to economic exchanges, the trading entities being individuals or companies. A network that allows trade is called a “market”.

Trade takes place in the context of the institutional and legal background conditions that structure and regulate the market. A “free market”, as opposed to a “regulated market”, is a market in which prices are determined by supply and demand without government intervention.¹⁵ “Free trade” is trade that takes place within a free market. An economy that is based on a free market is called a “free market economy”. With regard to domestic markets, it is the state that sets the institutional and legal background conditions of trade.

In a secondary sense, “trade” refers to trade between states. Here, trade takes place between trading entities from different countries, its background conditions being set by trade policies of and trade agreements between the respective states. These background conditions of trade are often referred to as “the trading system”. Note that this is sometimes also shortened to “trade” (cf. positions discussed in Part II). “Bilateral trade” designates trade between two entities (usually states) whereas “multilateral trade” designates trade between more than two trading entities. “Global trade” designates trade across countries and continents within complex networks of globally dispersed supply chains. With regard to global multilateral trade, it is above all the World Trade Organization (WTO) that sets the respective background conditions for trade.

Trade enables and is fostered by the specialization and division of labor. The latter operates by dividing work into narrow tasks that people can specialize in, whereas trade enables them to exchange the products of their specialized labor for money and thus everything else they need. Division of labor has been the source of material progress for many centuries, and especially since the industrial revolution. The respective specialization has two main benefits: First, it leads to professionals being very good at what they do – much better than anybody who does that task alongside hundreds of others. Second, it results in cheaper products, resulting from more efficient production through so called “economies of scale”. Economies of scale are the savings that result from having a particular task done by fewer groups in fewer places. In this way, transportation, machinery, and labor costs are drastically reduced. For example, rather than transporting the raw materials for knives to 10’000 households, and having knives being produced in 10’000 home forges by 10’000 amateur smiths, it is much more

¹⁵ This is of course a very sketchy definition. For a more detailed account of the free market, see chapter 5.2.1.3.

efficient to transport the raw materials to one village forge or, nowadays, one factory (thereby saving transportation costs), and having it produced by a few industrial machines (thereby saving the costs of building 10'000 home forges) by a few specialized professionals (thereby saving the huge amounts of time and effort of 10'000 people making knives).

The benefits of the division of labor become bigger the larger the group of people that trade their goods and services becomes – i.e. the larger the market gets. This is because the larger the market gets, the greater the degree of specialization that is possible, and the more specialization there is, the more benefits from it are generated. Accordingly products become cheaper and better as market size increases (all else being equal), and with cheaper products being available to more people, the economic standard of living rises. This effect holds in principle true across country boundaries too if trade is not restricted.

The efficiency-benefit just presented is one of many arguments that are brought forth in favor of free trade within a free market. We will investigate these arguments in detail in Part II, section 5.2 as we analyze the normative foundations of the claim “free trade is fair trade”. For now, all we need is the definition of trade supplied above to be able to make sense of the “trade”-element in the term “fair trade”. In the following we will turn to the second element of the term “fair trade”, namely the properly normative “fair”.

2. Differing General Concepts of Fairness

When making a judgement about the fairness or unfairness of trade, we do so according to a certain underlying understanding of “fairness”. This understanding of “fairness” is in many cases intuitive, and in some cases based on explicit reasoning. However, in order to understand the various positions concerning fair trade, it is crucial to look closely into the multi-faceted concept of fairness.

The terms “fairness” and “fair” are used with a confusing range of different meanings in English. I suggest we don't easily dismiss some uses of fairness as non-genuine, either in general or in the context of global trade. Rather we should proceed carefully in examining the concepts of fairness that are used in ordinary language, and in doing so assess their conceptual and normative adequacy.

In a first *generic* sense “unfair” is used to express that the speaker is unhappy with something that affects him negatively (Carr 2000, 7f). Someone could for example exclaim “that's unfair!” if it is raining on his wedding day, or when his train leaves just when he reaches the platform. Used in this sense, “fair” doesn't have a specific moral meaning but simply expresses the speaker's subjective displeasure.

In a second *moral* sense “unfair” is used in more objective ways, denoting the *presence of moral flaws* concerning the matter in question (ibid., 9). More specifically, two concepts of moral unfairness are of relevance for our topic:

In a first, *unspecific* moral sense, „unfair“ is used with regard to actions or situations that display *general* moral flaws. Someone could for example admonish a child who just hit another child “stop it, that’s not fair”! In this sense, “not fair” or “unfair” means simply “morally wrong” and “fair” means “morally right”. We will call this the *general moral* concept of fairness. General moral questions with regard to global trade are certainly of high importance and make a relevant appearance in the existing discussions on the topic of fair trade. We will therefore encounter the general moral fairness concept in this thesis as well.

In a second, more specific moral sense, “unfair” is used with regard to actions or situations that display *specific kinds* of moral flaws. For example, a child might claim that it is unfair that he got a smaller piece than everybody else in the distribution of a birthday cake, or someone might claim that a soccer game was unfair because the referee was partial, or it might be claimed that it is unfair if people from low income groups have less chances for getting higher education, etc. “Unfair” in this sense means something close to „unjust“ or „inadequate“. We will call this the *specific moral* concept of fairness.

When speaking of *fairness* and *fair* (with or without italics) in this thesis, it is this specific moral fairness concept I refer to. When I use “fairness” and “fair” in quotation marks, it is the term I refer to.

Although we intuitively seem to grasp the concept, when trying to pin down the specific kind of moral flaw that constitute specific moral unfairness it becomes clear that this is not easy. As an illustration, consider that in the above examples unfairness could be explicated in very different ways: in the first case as unequal distribution, in the second as partiality, in the third as inequality of opportunity. Even at second glance, none of these uses and explications seems implausible. This suggests that the concept of specific moral fairness is multifaceted: we seem to be using different “fairness principles” with regard to different kinds of situations, or with regard to different perspectives on situations. It is also possible that one and the same fairness explication plays out differently in different contexts. In chapter 4 we will examine different explication of specific moral fairness and consider the question just mentioned.

Now, even if we restricted the topic of this thesis to “fair trade” in the specific moral sense of *fairness*, the concept of justice would still play a very important role for our analysis. This is so for the following reasons: 1) the concept of specific moral fairness is closely related to the concept of justice, 2) the concept of justice is of high relevance in debates on fair trade, and 3) the concept of justice has been explored in much more detail by philosophers than the concept of fairness. In short, for understanding positions on what fair trade amounts to we need to gain an understanding of the concepts and theories of justice and their relation to our topic as well.

Let us start with the relation between the concept of justice and the concept of fairness.

2.1 The Relation between Specific Moral Fairness and Justice

In philosophical as well as in public debates there are several ways to understand the relation between specific moral fairness and justice. A first position holds that there is no clear distinction between them at all. Fairness accordingly is understood as meaning more or less the same as justice. Indeed, both in everyday language and in philosophical texts, “justice” and “fairness” are often used interchangeably – and so they are with regard to the topic of fair trade. This presumed overlapping of the concept of fairness with the related concept of justice might explain the striking lack of theories of fairness mentioned in the introduction. Indeed there are almost no thorough analyses of the concept of fairness in the classical philosophical literature, whereas the concept of justice (and, besides, the concept of equality) has frequently been at the center of such analysis, often building the core of encompassing ethical or political theories.

When justice is understood in the traditional sense of “giving each person what they deserve” (see 3.1), we could say then that unfairness consists in the flaw of people not receiving their just deserts.

However, there are also positions that distinguish conceptually between fairness and justice. While there are a number of possibilities, I will present the two which seem most plausible to me. A first position understands justice as being concerned with *outcomes*, mainly in terms of distributions, whereas fairness is concerned with *processes*.¹⁶ A position along these lines seems for example to be taken by Rawls in his *Theory of Justice* (1971), where he proposes to identify a *just* basic structure of society by means of a *fair* process for determining its traits (see 3.7.1).

To illustrate the difference between fairness understood as process-focused and justice understood as outcome-focused and its intuitive plausibility we can look at the following example from Carr (2000): Suppose S receives a sentence for a crime she has not committed. Carr suggests that we would then consider her being punished *unjustly*, since she doesn’t deserve the punishment. But if S’s conviction followed a trial which qualifies as fair (because proper procedures were followed), and if “she is sentenced to a punishment commensurate with the nature of the crime she is mistakenly said to have committed” we assumedly wouldn’t consider her punishment *unfair* (Carr 2000, 44). Rather we would say that justice has not been done “even though the trial was fair” (ibid.). Imagine on the other hand a case where S is sentenced to a punishment which is far too severe for the crime she allegedly committed, perhaps because the judge happened to dislike her. Now we would complain that the sentencing is *unfair* because the process was flawed. Carr concludes from this that „Fairness (...) looks to the integrity of process and not to desert” (Carr 2000, 45).

In theory, this differentiation would seem analytically helpful to me. But it is complicated by the fact that “fairness” is also widely used with regard to outcomes and background

¹⁶ For the distinction between the background, procedural and outcome dimension see 3.5.

structures, both in general and in debates on fair trade. It is for example claimed that it is unfair that developing countries don't profit enough from global trade (outcome), or that it is unfair that they don't have the chance to participate in global trade on equal terms with developed countries (background conditions).

There is a second way to distinguish between justice and fairness that may be able to account for this fact. In this perspective, justice is understood as a trait of *institutions* that govern whole societies (or cooperative contexts) and distribute rights and resources among their members.¹⁷ This institutional understanding of justice is nowadays the mainstream view among political philosophers (Murphy 1998; cf. Barry 1995; 214, Bleisch 2010, 63). In this sense, the predominant realm of application of justice is understood as being the *state*.¹⁸

When justice is understood in this way, general ethics is understood as being concerned with individual actions (Bleisch 2010, 64; Pogge 1989, 17). Fairness on the other hand can be understood as being concerned with particular social practices and interactions, such as playing games, queuing, bargaining, etc., and their background conditions, processes and distributive outcomes. In this sense, we would say about institutions that they are just or unjust, whereas we would say about particular practices and interactions among individuals within those practices that they are fair or unfair. Understood in this sense, fairness gains more importance where institutions are weak or absent. Global trade might be a case in point, which might explain the prevalence of the notion of fairness in this area.

In the conclusions of Part I, I will explain how I will be using the terms "just", "fair", and "ethical" trade with regard to the classification of positions on fair trade in Part II. For now though we will simply keep those different possibilities in mind while I keep using the terms in an unspecific way. Since in the next chapters we are moving in the realm of general and sometimes very old ethical principles, a specific use for now would not make sense.

Now, let us turn to those principles that justice and fairness clearly have in common, and some of which they also share with general ethics. In order to understand the moral grounds of questions and positions about fair trade, we need to gain an understanding of these basic principles. To this aim, in a next step we will examine the traditional concept of justice, its different aspects and their relevance for the topic of fair trade. In the course of this we also need to clarify the relation and relevance of issues of general morality for the broad topic of fair trade.

¹⁷ In this sense, Rawls (1971) called justice the first virtue of social institutions.

¹⁸ This position and versions of it that consider the world as a whole as a context of justice are presented in chapter 3.6.

3. Justice, General Ethics, and Fairness

3.1 Justice, Reciprocity, and Proportionality

Traditionally, justice in a broad, moral sense is understood to be about moral equilibrium. The moral equilibrium is intact if people get what they deserve and is broken when they don't. In this sense, justice is traditionally understood as being concerned with "giving to each what they deserve", "what they are owed", or "to each his own" (*suum cuique tribuere*). In this understanding, justice applies to individuals and institutions alike. Sometimes this basic understanding of justice is thought to apply to "fairness" as well, as expressed by Koslowski in the following statement: "According to the natural right tradition from the Roman *Corpus Iuris* up to Thomas Aquinas, fairness is the permanent attitude, supported by will and directed by prudence, to give each his own, especially his rights" (Koslowski 1996, 72; cf. Boda 2001, 22).

An aspect of this basic understanding of justice is the concept of *reciprocity*. Reciprocity is about a moral equilibrium of *give and take*: if A *gives something* to B (help, money, etc.), A seems to deserve to *get something back* from B in return (positive reciprocity). If A *takes something away* from B, B seems to deserve *getting it* (or something of similar value) *back*, whereas A seems to deserve to have something similar taken away from him (negative reciprocity).

Reciprocity is often cited as one relevant "fairness" standard with regard to trade (Suranovic 2000; Miller 2010). We will examine in detail how this plays out in Part II.

As to *how much* we should give (or take), it should be *in proportion* to that which we got ourselves. *Proportionality* is then another aspect of the basic concept of justice. As such a just punishment must be in proportion to the graveness of the crime, a reward proportional to the deserving deed, etc. As Aristotle put it, justice demands that what people get is proportional to their deserts (Aristotle, *Nicomachean Ethics*, 1131a30).

As we just saw, justice as proportional reciprocity comes in both a positive and a negative form. Negative reciprocity implies that an equilibrium should exist between the damage done to the victim of a crime and the damage the perpetrator suffers in consequence (or its translation into monetary compensation). While this idea has been very influential historically, negative reciprocity has been rather discredited from a theoretical moral perspective. The standard is, however, presumably of relevance with regard to concerns about retributive justice for crimes committed in the context of global trade.¹⁹

Much more important nowadays is positive reciprocity. Positive reciprocity demands that we repay positive deeds with equally positive deeds. It is, as such, implicit in the common notion to

¹⁹ Suranovic (2000) takes negative reciprocity to be a specific fairness standard in debates on global trade. I will not discuss this position since negative reciprocity is a purely formal "fairness" standard that is at odds with the understanding of fairness and justice understood as thick ethical terms (that is, fairness in this sense would require us to do morally bad things for reasons of retribution. cf. also chapter 4.3).

owe something to someone because he did something for us.²⁰ Although, to my knowledge, it hasn't often been explicitly in the center of philosophical attention, it is an extremely important and basic moral principle. To consider the intuitive appeal of the principle, let's look at some examples: I always help you out when you are out of money. When the reverse situation arises, what is morally demanded of you? Rather uncontroversially, I think, you should do the same for me (if you are in a position to do so). Why? Because positive reciprocity demands that you benefit me the way I benefitted you. In any case, if you don't help me although you could, I (and also uninvolved third persons) would consider this morally blameworthy of you. Take another example: two people cook a meal together, one of them cutting the ingredients and the other mixing, seasoning and cooking them. How would we judge one of the two if he insisted in eating the meal all by himself? Again, we would consider this unjust (other things being equal), since it violates the norm of positive reciprocity claiming that he who benefits another in an interaction should be benefitted sufficiently by him as well.

The norm of reciprocity seems to be deeply engrained in our evolutionary make-up. This view is taken by Tomasello and Herrmann (2010), who conduct empirical studies on the behavior of small children and apes, and conclude that reciprocity seems to lie on the very basis of human sociability. In fact, reciprocity as the tendency to reciprocate positive or negative behavior is so basic that even many animals show it (*ibid.*). Others, like Axelrod (1984), claim that some kind of "tit-for-tat" reciprocity is a basis for morality and a form of justice.

John Rawls shares the assumption that the fact that people act according to the norm of reciprocity makes societies possible in the first place (Rawls 1971, 433), and he gives weight to this in his theory of justice. There and in other theories of justice, the norm of reciprocity is seen in the context of beneficial interactions within whole societies, which are usually called contexts of *cooperation*.

Cooperation is often understood as generating duties of fairness and distributive justice on the basis of the norm of positive reciprocity (see 4.7). John Rawls for example sees social cooperation – understood essentially in the sense of a system of wealth production based on labor division – as implying norms of reciprocity and thereby as the basis for the claim to distributive political and economic justice (Rawls 1971).

He is right, I think, to claim that reciprocity is of basic importance for society. But as we just saw, the norm of positive reciprocity is much more basic than that. It is a fundamental moral intuition we seem to apply to (basically) every beneficial human interaction.

²⁰ I owe this remark to Lars Dänzer.

3.2 Claims, Rights, and Claim Bases

In a more contemporary terminology, the general concept of justice can be understood as the requirement that *legitimate or stringent claims or rights* must be satisfied or honored.²¹ The counterpart of a claim or right is the duty on someone's part to the fulfillment of it.²² Justice in this broad sense is concerned with fulfilling people's stringent claims, and with the fulfillment of the respective duties, as opposed to merely *meritorious or supererogatory deeds*. For example, people are usually thought to have a right not to be killed, tortured, coerced, deceived, and lied to, and they have stringent claims to get what they have been contractually guaranteed or promised, and to get back what someone borrowed from them.

The question on *what grounds* people can have stringent claims to something, in general and in the context of trade in particular, can be formulated as the question what the relevant *claim bases* are in the relevant context. Some stringent claims are so basic that they are usually thought to require nothing more than being human as their claim base. They are called *natural rights* and go back to John Locke's theory on natural rights (cf. Locke 1690; Hart 1955. Cf. chapter 3.6.2). The theory holds that every person has equal basic moral rights, so-called natural rights, which constrain other people's actions. They are called natural rights because they are thought to apply independently of institutional arrangements or beliefs. Their range is traditionally understood along the following lines: "Each person has the right to do whatever she chooses with whatever she legitimately owns so long as she does not violate the rights of others not to be harmed in certain ways – by force, fraud, coercion, theft, or infliction of damage on person or property. Each person has the right not to be harmed by others in the mentioned ways, unless she voluntarily waives any of her rights or voluntarily transfers them to another or forfeits them by misconduct. Also, each adult person is the full rightful owner of herself and each child person has the right to be nurtured to adult status by those responsible for her creation. It is generally supposed in the Lockean tradition that starting from the premise of self-ownership, under actual conditions on earth one can validly derive strong rights of private appropriation and ownership of land and moveable parts of the earth." (Arneson 2013, cf. Nozick 1974).

The right to equal freedom of every human being is often thought to be the most basic one (e.g. Hart 1955), entailing many of the other rights like the right not to be killed, tortured, deceived, etc. In the terminology of rights, these claims are called negative rights, meaning that they are claims to be free of something. Historically, natural rights are an important predecessor of what we nowadays call Human Rights.²³

Claims are based on people's voluntary dealings or "transactions" with each other, such as the

²¹ I will not distinguish sharply between rights and claims since this is a complex issue and it is not important for our topic. For the relation between the two see e.g. Feinberg 1964.

²² For the connection between rights and duties cf. Feinberg 1964; Shue 1996, 153f; Raz 1986, 420f.

²³ UDHR 1948. For an excellent philosophical overview on the topic of Human rights see Griffin 2008.

claims to get what was agreed upon in contracts and to that which was promised. Others still arise out of special relationships that people have with each other, such as the one between parents and their children. Both of them are part of what Hart calls *special rights* (Hart 1955, 183). What all special rights have in common is “(...) that they arise out of special relationships between human beings and not out of the character of the action to be done or its effects.” (ibid., 186). For example, when something is promised to somebody, “we voluntarily incur obligations and confer or create rights on those to whom we promise” (ibid.). What is also special about special rights is that they are limited to specific others: “When rights arise out of special transactions between individuals or out of some special relationship in which they stand to each other, both the persons who have the right and those who have the corresponding obligation are limited to the parties to the special transaction or relationship.” (Hart 1955, 183).

Note that at the most basic level, the question as to what counts as a base for stringent claims is a question that normative moral theories try to answer, and different moral theories do so differently. Until now I spoke as if there were different kinds of claim bases, and I actually believe this is the case. However, let me mention the perspective of Utilitarianism²⁴ as a normative moral theory that works on the assumption of a single claim base.

In *utilitarian* theories there is only one basis of stringent claims, namely well-being (or something similar). In any situation, claims arise from the well-being of people (or beings with genuine interests), and everyone’s well-being counts equally in the pursuit of the overall goal, which is maximization of overall well-being. When relying on utilitarian theories, comparing claims in the sense justice demands is quite straightforward: the different claims are compared by utilitarian aggregation (i.e. by comparing the utility different individuals would get from an action), and competing claims are satisfied in proportion by including each in the aggregation in accordance with its strength. In a utilitarian perspective, justice then amounts to choosing the action that maximizes aggregate utility, and in this the demands of justice coincide with the demands of morality in general.

An important concept in utilitarian theory is the law of decreasing marginal utility. Marginal utility is the change in the utility from increase or decrease in the consumption of a good or service. The law of decreasing marginal utility holds that with the amount of units consumed, the increase in the utility of one unit decreases. For example, if someone is hungry, the first apple he eats has a very high utility, the second he eats in a row has a slightly lower utility, the third an even lower one, and by, say, the 20th apple the increase in utility will be close to zero (by then he probably even feels sick of apples).

With regard to the question of just trade, a utilitarian perspective might be in the background of some people’s intuition that certain things in the context of global trade are unjust – for

²⁴ For a classic exposition and defense of Utilitarianism see Mill 1998 [1863].

example, workers in developing countries in the supply chains of MNEs earning below-subsistence wages. The reasoning could be this: because of the law of decreasing marginal utility, the workers have more weighty claims to the extra money that would raise their salaries to cover their subsistence needs than the MNE, since the positive effect of that money on their well-being would be substantially higher than if it went to the profits of the supplier or the MNE. Therefore, living wages in this context are a demand of ethical trade.

However, if we look at it more closely, the utilitarian perspective on claim bases rests on very counterintuitive assumptions, which has consequences for the plausibility of arguments such as the above. For example, we usually think (and our legal systems are based on the idea) that people can get a stringent claim to certain things by their individual actions – a thought that has no space as such in utilitarian theories. We generally think, for example, that people have a stringent *prima facie* claim to their legitimately earned property which cannot simply be overrun without further justification by the fact that this property would be more conducive to overall well-being if taken away from them, as utilitarian reasoning (at least on the face of it) would have it.

If we e.g. think about what considerations (i.e. claim bases) should flow into the determination of *just wages*, we would certainly not think that the only relevant claim base is the *well-being* of the workers – rather we would presumably think that a wage should take into consideration the productive contribution of the workers, their qualifications, their responsibilities, their effort, possibly also their needs, etc.²⁵ The utilitarian perspective also leaves no room for taking into account the issue of voluntary consent to work contracts. In short, it treats distributions in the context of trade and business as if they were happening in a morally unstructured vacuum, which seems clearly inadequate.

I take it that the idea that there is not just one base for stringent claims but that there are multiple ones is better in accordance with our intuitions. Contrary to utilitarian theory, in deontological theories there is a range of possible bases for stringent claims above the ones based on special relations. Some of the most widely accepted ones are *desert* or *merit*, *need*, and *entitlement*. *Effort* is another but more controversial candidate. Let me give some examples without going into any details here: a scientist seems to have a claim based on *merit* to a prize because of his individual achievements, a criminal might have a claim based on *entitlement* to a trial in accordance with the legal rules, and the drowning child from the example above seems to have a claim based on *need* to being saved by a passer-by.

When there are different claim bases it is not straightforward how claims should be compared. A deontological theory must elaborate for example how needs- and entitlement- based claims are to be compared, possibly assigning priority to one. Also, it has to explain how claims made on different bases should be satisfied proportionally. In a deontological perspective then, morality

²⁵ On wage justice see e.g. Köllmann 2010.

operates in a more complex way than it does in utilitarian ones, and might demand things that are in opposition to consequentialist considerations.

As we said, moral claims always generate corresponding duties to their fulfillment. But how exactly are these duties to be conceived?

3.3. Duties of Justice, Duties of Benevolence, and Duties of Special Relations

The counterparts to the above mentioned universal basic human claims (not to be killed, tortured, coerced, and deceived) are *duties of justice*, or in Kant's terms *perfect duties*. They are owed to everybody, always. Traditionally, perfect duties were thought to be situated predominantly in the realm of *negative* morality, meaning that they require us to *abstain* from actively doing something to others – namely from infringing their moral rights or, roughly speaking, from wronging or harming them. Examples are the duty of justice not to kill, to torture, to steal, coerce, or deceive others. These are duties that *prima facie* apply to everybody, always. Observing these duties requires us *not to act* (in certain ways), whereas the *violation* of these duties is *active*, that is, the performance of the forbidden action. On the other hand, in this (simplified) picture *omitting* an action cannot be a violation of a perfect duty.

On the other hand, duties of benevolence or *imperfect moral* duties are duties that are meritorious, but not strictly morally required. Examples include paying for the education of the children of someone else, helping others attain their plans and goals, or giving to charity. Such imperfect duties were traditionally thought to be situated in the realm of *positive* morality, meaning that they require us to *actively do* or *give* something to others.

Applying the broad concept of justice as fulfillment of people's stringent claims (by people performing their perfect duties) to the topic of global trade, *just global trade* could be understood as *global trade in which people get what they deserve*, or *global trade in which the legitimate or stringent claims of people are honored in proportion*. Clearly, this is a relevant topic when thinking about the moral issues involved in global trade. However, when justice is understood in this broad sense, its demands mostly coincide with those of general deontological morality (i.e. the fulfillment of perfect moral duties). Terminologically, I therefore take it that it makes more sense to call the issue of fulfilling the perfect moral duties related to trade (and thereby fulfilling the stringent moral claims of the people involved or affected by it) *ethical trade*, and to reserve the term "just trade" to designate a more narrow understanding of justice in trade. In this sense, the question of *ethical trade* then can be formulated like this: What exactly are the stringent moral claims and the perfect moral duties in the context of trade?

Perfect negative duties apply in the context of trade as well as in any other area of life. The default picture of what morality demands in economic transactions has long been somewhat like this:

If someone keeps his contracts, doesn't coerce and deceive their trade partner²⁶ they fulfill all that morality strictly demands – and thereby can be said to comply with the demands of ethical trade. In this perspective, if someone offers their trade partner a better deal than is necessary for them to agree to the transaction this is certainly generous and morally meritorious, but it is not strictly demanded by morality – and therefore not required for “ethical trade”. If someone omits offering assistance to a trade partner in bad circumstances (above what is agreed contractually), in this perspective he presumably doesn't violate any duty of justice.

Now, the above picture is of course too simplistic. First, there are certain specific grey areas with regard to negative duties in trade. Let me just mention some: One concerns the concept of *exploitation* and its moral implications. Although most people would agree that we have a perfect moral duty to abstain from exploiting others, when looking at it more closely it becomes apparent that it is highly controversial what exploitation entails, and what the respective duties involve. We will engage with the concept of exploitation and its relation to fair trade in detail in chapter 7.4.1.

A second grey area concerns the moral assessment of *contributions* to right violations or harms in complex situations – such as human rights violations in global supply chains. While it is clear that the stringent claims or rights of people have been violated in these situations, it is controversial who carries what part of the moral responsibility for this. The main issue is whether or to what extent actors are responsible if they do not *directly* harm others in the context of trade but are nevertheless *connected* to the harming in some way – for example by *contributing* to the wrong, or by *enabling* it somehow. Examples are cases where wrongs are committed at some point in global supply chains, like in an independent local plant or plantation in a developing country. Are institutions and MNEs responsible for the wrongs too? What duties do they have in these kinds of situations? We will engage with the concept of responsibility in chapter 3.4, and with its application to said questions in detail in chapter 7.4.

The second reason why the default picture sketched above is too simplistic is that the strict association of perfect duties with negative morality and imperfect duties with positive morality doesn't stand up to scrutiny. As an illustration, take the famous example by Singer (1972): a passer-by walks past a pond in which he sees a child drowning. Since he has not personally harmed the child, the strict association of duties of justice with negative duties would suggest that the passer-by does not have a duty of justice to save the child. Of course this is highly counter-intuitive. Rather, it seems intuitively clear that the passer-by has a strict (perfect) moral duty to actively try to save the child – provided he can do so without great danger to himself. This is an *action* though and belongs to the realm of positive morality. The example accordingly shows that the strict association of perfect moral duties with negative morality (requiring us to abstain from actions) is intuitively not convincing. Rather, or so is often assumed, strict duties *do* include certain positive duties, such as the duty to

²⁶ And of course doesn't torture or kill etc. him either.

assist strangers in desperate need of help when this is possible at a low cost to oneself. Conversely it might be an imperfect duty to help others with less crucial aims and plans, and to help strangers in need at high danger and/or cost to one self.

Transferred to the context of trade, an intuition along the above lines might be at work regarding many people's opinion that trade partners or employers do in fact have a perfect duty to help their trade partners or employees in desperately bad conditions improve their situation – if this is possible at low cost to themselves. Understood in this way, this assistance would be a perfect positive duty, analogous to the example with the drowning child above. On these grounds it could be tried to argue that companies have a perfect duty in the context of trade (i.e. a duty of ethical trade) to make sure their employees' basic daily needs are met, pay for their life-saving medical treatment etc. Such a duty of assistance in desperate circumstances *could* be a moral base for perfect positive duties of companies towards their workers.

However, the problem with this claim is that it is *prima facie* unclear why it should be the *companies* that have the duty to offer the said assistance – and not another actor like the state where the respective people in desperate circumstances live.

While I will engage with this question in detail in chapter 7, let me anticipate that I see two general lines of argument one could pursue when trying to ground the claim that actors (like MNEs or states) have certain perfect positive duties towards their trading partners. The first one approaches the issue through the concept of *responsibility* and uses a theory of responsibility to argue that the respective actor has certain positive duties regarding his trading partners. The second one approaches the issue through the concept of duties of special relations, and argues that the relationship between trading partners is of a kind that inherently generates certain positive duties on the part of the trading partners.

Duties of *special relations* are based on what Hart calls Special rights (Hart 1955, 183f; see chapter 3.2). As such they are based on the idea that certain kinds of relations between people are sufficient to ground particular claims and duties between them – most notably, but not exclusively, certain *perfect positive duties*. For example special relations are often considered to be a claim base for duties of solidarity. In other words, contrary to other positive duties, such positive duties of special relations are inherently assigned to specific actors because of their relationship with the person who has the according claims. Classic examples of duties of special relations – or role obligations as they are sometimes called – are special duties of parents towards their children, of spouses or partners towards each other, and of co-nationals towards each other (like in Millers theory of responsibility, see section 3.5). Besides, there are duties of special relations as part of certain professions, such as doctors, lawyers, etc., the respective content of which varies according to professional relation.

What is special about them from a normative point of view is that they legitimate and even call for a general partiality of the duty bearer's towards the claim holder, which might seem peculiar from an abstract normative perspective. However, I agree with Scheffler that rather than being strange or questionable, the partiality they result in is a very important part of morality (e.g. Scheffler 2001): "(...) the demands of morality, as ordinarily interpreted, have less to do with abstractions like the overall good than with the specific web of roles and relationships that serve to situate a person in social space" (ibid. 36f).

Some authors argue for a direct justification of duties of special relations (e.g. Williams 1981), others for a two-levelled justification (e.g. Barry 1995). For reasons of scope I will discuss these different approaches here. What matters for our purpose is that I assume special obligations to be justifiable in principle.

So far, in this framework we have not encountered duties of specific moral fairness. How then should they be conceived? Are they perfect or imperfect duties, or do they belong to the category of duties of special relations? While I will discuss this question in detail in chapter 4, let me anticipate that I will propose to understand duties of fairness as a particular kind of duties of special relations. This will then be used in chapter 7 to ground the argument that trade inherently generates certain positive duties as a demand of fairness on the part of the trading parties.

For now, let's now turn to then concept of responsibility which is crucial for assigning duties to particular actors.

3.4. Responsibility

While the concept of duties specifies what the fulfillment of claims or rights demands, the concept of responsibility translates this into concrete demands on particular actors, that is, it specifies who has which duties. As we saw before, with negative duties it is straightforward who has the duty to fulfill the corresponding claims: since they ask us to *omit* certain acts, namely those that harm others (or violate the negative rights of others), the according responsibility to fulfill negative duties falls to each actor himself, that is, everybody has the duty to omit such acts.²⁷ With regard to positive duties of assistance, this is more complicated, and here the concept of responsibility becomes highly important.

Let me note that here that I am not interested in *legal* responsibility, but in *moral* responsibility. Nevertheless, moral responsibility and legal responsibility are structurally closely related concepts, and since the latter has long been closely studied by law-scholars, we will turn to legal specifications of the concept of responsibility when they are useful our discussion.

Ascriptions of responsibility imply three general aspects: (1) Who is responsible, (2) what he is

²⁷ The question of who has the duty to ensure that others don't violate their negative duties concerns in turn a positive duty of assistance, since it demands that certain actions be actively taken.

responsible for, and (3) towards whom he is responsible.²⁸ Let me say something about the first aspect: for an actor to be the subject of justified assignments of responsibility at all (1), a crucial condition has to be met: He has to be a moral agent. This is why we cannot assign moral responsibility to a computer system, to a natural catastrophe, or to “the market”. For an actor to qualify as a moral agent, three necessary and together sufficient conditions have to be met (cf. e.g. Neuhäuser 2011, 57): He has to 1) be able to act (by doing or omitting something), that is, he has to be able to actively interfere in the world. This criterion is about causality. He has to 2) be able to act freely, that is, he has to be able to choose between alternative courses of action. This criterion is about freedom of action and will. And he has to 3) be able to make decisions for or against a course of action according to moral criteria. This criterion is about the ability to take the moral point of view.

What is important in the context of this thesis is the question if these criteria are only fulfilled by individual human actors, or if collective entities, especially states and companies, can be moral agents as well and thereby the subjects of ascriptions of moral responsibility. To discuss this question in detail is outside the scope of this thesis. In the following I will assume the position, following authors such as Neuhäuser (2011), Werhane (1985), French (1979, 1984), that companies and institutional actors like states can indeed be considered moral actors, and therefore are potential subjects for the ascription of responsibility.²⁹

3.4.1 Prospective and Retrospective Responsibility

Legal and moral responsibility has two temporal directions: a prospective and a retrospective one.³⁰ *Prospective responsibility* consists in an agent having certain legal or moral duties concerning someone or something, where those duties are created by his role, task, or a certain activity (Cane 2002, 31). This obviously relates back to claims and duties of special relations (see 3.2. and 3.3). Examples are the responsibility of parents for their children, the responsibility that comes with one’s profession (like the responsibility of a doctor for treating his patients according to the Hippocratic Oath, or the responsibility of a watchmen to keep watch), the responsibility that comes with the activity of driving a car (the duty to drive safely), etc. The law imposes many such responsibilities, for instance on employers in favor of employees, on doctors in favor of patients etc. (ibid., 31). In law, these prospective responsibilities are mostly based on contracts or agreements, but they are not confined to them as the case of family relations shows.

The counterpart of prospective responsibility is historic or *retrospective responsibility*, which is directed at past violations of duties. If someone has *actively and directly* harmed someone else, this

²⁸ For an overview over the many questions related to responsibility see e.g. French (ed.) 1991.

²⁹ I agree with Neuhäuser that they should not be conceptualized as *persons*, which has the important moral implication that they have moral duties whereas not having moral rights (since they lack the according traits) (cf. Neuhäuser 2011, 98f).

³⁰ See e.g. Cane 2002 and Craig 2000.

is what lawyers call *misfeasance*; if one has *omitted to prevent someone from being harmed* this is called *nonfeasance*. Retrospectively, someone is usually taken to be (legally) responsible for his misfeasance, but not generally for his nonfeasance. But to the extent that one's prospective responsibilities require one "to take positive steps to achieve good outcomes or to prevent bad ones, prospective responsibility (...) can lay the foundation for historic responsibility for omissions and what lawyers call 'nonfeasance'" (ibid., 32). In other words, if one has the prospective duty to prevent someone from being harmed and fails to do so, they become retrospectively responsible for their nonfeasance.

It is plausible to claim that this line of reasoning applies to moral responsibility as well. To illustrate this, look at the following example: a robber robs a bank, while the bank's watchman is watching television instead of keeping watch. Here the robber is obviously morally responsible for his misfeasance. But it seems equally clear to ascribe moral responsibility to the watchmen because he violated his prospective responsibility in the form of the duty to keep watch.

What has been said on responsibility so far illustrates three things of high importance with regard to the responsibilities in the context of fair trade. First, the example illustrates that responsibility is dividable. It is in fact very common for more than one actor to be co-responsible for a wrong, either by misfeasance or nonfeasance. This means that, for example, although states might in principle have the responsibility to ensure their citizens' survival by means of working social systems, or legally independent suppliers in developing countries are responsible for poor working conditions in their facilities, this is not enough to show that MNEs don't carry a corresponding co-responsibility for them.

Second, if a moral actor actively and relevantly contributes to the violation of people's stringent claims in the context of trade (for example, an MNE contributing to health-damaging working conditions in an independent supplier), we have reason to ascribe retrospective responsibility to them with regard to those conditions. However, as we will see in chapter 7., it is very difficult to define what counts as an active and relevant contribution to a wrong in complex causal contexts.

Third, we saw that when we have established that someone has a special prospective responsibility for someone or something this is a basis for ascribing to him retrospective responsibility in the case where he has not prevented something bad from happening. Importantly, the distinction between acts and omissions is not relevant in this respect: if, in the above example, we describe the watchman's action as an omission, this doesn't make him any less responsible. So if we can argue convincingly that MNEs have a prospective responsibility for ensuring good working conditions for the people in their supply chains this justifies ascribing to them retrospective responsibility in case they don't prevent bad working conditions in their suppliers even if they themselves do nothing that actively wrongs someone and only omit intervening.

In the following I will introduce a highly interesting approach for ascribing responsibility in complex contexts: David Miller's connection theory of remedial responsibility (Miller 2007). Although

it was formulated for another context, it constitutes a helpful theoretical framework for answering questions of responsibility in the context of global trade.

3.4.2 Miller's Connection Theory of Remedial Responsibility

Miller's theory of responsibility distinguishes between two main concepts of responsibility, namely *outcome responsibility* and *remedial responsibility*.³¹ *Outcome responsibility* (following Honoré 1999) is the responsibility agents bear for *the outcomes of their past actions*, whereas *remedial responsibility* is the duty of agents to *put certain bad states of affairs right* (Miller 2007, 83-4). In terms of the distinction between prospective and retrospective responsibility introduced above, outcome responsibility is located within the realm of retrospective responsibility. With remedial responsibility things are more complicated: it is forward looking like prospective responsibility, but unlike the latter it is concerned with rectifying an already bad situation.

The first concept we are interested in with regard to our topic is *remedial responsibility*: Remedial responsibility, as we said, is relevant when there is a state of affairs in need of remedy – in our case, bad conditions in the supply chains of MNEs. The reflections regarding remedial responsibility start with the state of affairs in need of remedy, and then analyze who we have reason to identify as being responsible for remedying it. With regard to our topic, we are of course interested if MNEs can be identified as remedially responsible for bad working conditions in their independent suppliers. How then are we to make judgments of remedial responsibility?

Miller proposes what he calls a “connection theory” of remedial responsibility: “The basic idea is that A should be considered remedially responsible for P's condition when he is linked to P” (Miller 2007, 99) in one or more of the following ways: 1. A is *morally responsible* for the wrong to P, 2. A is *outcome responsible* for the wrong to P, 3. A is *causally responsible* for the wrong to P, 4. A has *benefitted* from the process that led to P's deprivation, 5. A has the *capacity* to remedy the wrong, 6. A is member of the same *community* as P.³² In other words, the mentioned connections are *criteria* or *reasons* for the ascription of remedial responsibility to particular agents. They will be explicated in some detail and related to our question below. However, I will not argue for them here but rather assume for the sake of the argument that they are plausible on the grounds that they fit very well with common intuitions on the topic.

Let me start by looking at the relation between the different criteria. The three former criteria – moral, outcome, and causal responsibility – are connected in the sense that moral

³¹ A similar approach is taken by Young 2007, who distinguishes between a *liability model of responsibility* and a *social connection model of responsibility*.

³² Since MNEs are predominantly from another country (and community) than the workers at the beginning of the supply chains, the community-connection is usually not directly relevant for this question. Note however that it can be used to argue for a remedial responsibility of local countries or communities for bad working conditions on their territory or concerning their people.

responsibility (which in Miller's sense implies blameworthiness) is the most comprehensive one, usually implying outcome responsibility, which in turn implies causal responsibility. This suggests that moral responsibility is the strongest criterion, outcome responsibility the second strongest and pure causal responsibility the third. In contrast, the latter three conditions are independent from the first three and from each other.

In case most of the above criteria are fulfilled by the same agent, this gives us weighty reasons to identify this agent as remedially responsible and accordingly assign remedial responsibility to him. In case the criteria point to several agents, we might assign shared remedial responsibility to some or all of them. But what is normatively called for if the different criteria point to different agents and thereby conflict? In such cases, according to Miller, "there is no algorithm that could resolve such disputes. We have to rely on our intuitions about the relative importance of different sources of connection" (ibid., 107).

We will use this theoretical framework in chapter 7.4.2 to examine the concrete duties of MNEs with regard to the people in their supply chains.

3.5. Structural, Procedural, and Outcome Justice or Fairness

Let us now have a closer look at the aforementioned distinction between the background, procedural, and outcome dimension of justice and fairness. When having a closer look at different situations where we apply the concepts of justice and fairness, it becomes clear that we use it with regard to different *dimensions* of situations. This can be shown well by considering the case of negotiations. For the overall assessment of a negotiation as just or fair, three dimensions seem to be potentially relevant: first, the *preconditions* of the negotiation, second, the *process* of the negotiation itself, and third, the *outcome* of the negotiation. These three dimensions can be called *structural or background* justice, *procedural* justice, and *outcome* justice. Their relevance is not restricted to negotiations but potentially applies in all situations that seem to generate concerns of justice or fairness.

The first dimension of justice, structural justice, is concerned with the *preconditions* of the proceeding in question (negotiation, competition, distribution, etc.), or in other words, the background conditions that structure them. In the case of negotiations for example, structural justice concerns the context and forum of the negotiation, the criteria for the determination of participants to the negotiation, and for agenda setting. Structural justice honors the claims of people to *chances for participation and success*. When questions of background justice are about a whole social system (as opposed to particular practices like a negotiation, a competition etc.) they are what I will call genuine questions of *social justice*.

The second dimension of justice is concerned with the *process*. It looks at the procedures used and the behavior of the participants in the process (of the negotiation, competition, distribution, etc.).

Procedural justice honors the claims of people to a *just or fair process* of the practice in question. For example, in a trial procedural justice demands that the laws are followed properly, the judges don't accept bribes and make their decision impartially etc.; in a sports competition it demands that the athletes follow the rules of the game and play fair, and that the referee is impartial.

This procedural dimension of justice is often, though not uncontroversially, equated to the concept of *fairness* (see 1.1). Understood in this sense, *procedurally just* trade would be *fair* trade. From the trading individuals' perspective, procedurally just trade is usually thought to amount to no lying, coercing, contract breaking, law breaking etc. That is, procedurally just trade in this understanding must mainly fulfill the classic perfect negative duties that are relevant in trade.

However, even if one accepts the equation of procedural justice with fairness, it is still unclear what the correct explication of procedural justice or fairness is – is it generally compliance with negative duties? In this case fairness would coincide with general morality. Is it compliance with the rules? Is it Impartiality? Not disadvantaging others? This question will be discussed in detail in chapter 4.

It should be noted that there is an important *relation* between background justice and procedural justice or fairness. This relation is such that the former *sets the stage* for the latter, i.e. just background conditions set the stage for a procedurally just or fair proceeding (negotiation, competition etc.). As an illustration consider Barry's example of a boxing match: „(...) procedural fairness rules out one boxer having a piece of lead inside his gloves; but background fairness would also rule out any undue disparity in the weight of the boxers; similarly background fairness would rule out sailing boats or cars of different sizes being raced against one another unless suitably handicapped” (Barry 1965, 98-99). As another illustration consider a famous cartoon: a horse, an elephant, a bird and a monkey, all of them participants in a competition, are sitting in front of the judge who explains the task of the competition: “Every competitor has to fulfill the same task: Climb this tree!”. It is obvious that, although the *process* of the competition is *just* in that everybody gets the exact same task, there is something genuinely unfair about the competition – namely that the different set up of the animals makes for unfair or *unjust background conditions* in the sense of unequal chances in the competition: a monkey and an elephant have highly unequal chances when it comes to climbing a tree. This relation between background justice and procedural justice or fairness is highly relevant for questions of fair or just global trade. It will therefore come up prominently later on in the discussion.

Let's turn to the third dimension of justice now, which is concerned with the *outcome* of the proceeding (negotiation, distribution, etc.). It is also referred to as the *substantive* dimension of justice (as opposed to the procedural and structural dimensions). Outcome justice looks at the principles underlying the distribution which is the result of the proceeding, or more precisely, the distribution of *burdens and benefits* in the outcome of the proceeding. Just outcomes honor the

claims of people to a *just or fair share of the burdens and benefits* in the distribution in question. What exactly just or fair shares amount to is of course highly context dependent, and even regarding specific contexts everything but trivial.

In the context of questions of fair trade, outcome justice is relevant in that it is often claimed that the *distribution of burdens and benefits* from global trade is unjust or unfair. This criticism can be directed both to the trading system as a whole (see e.g. Aaron James' position, chapter 5.2.5), or at trade in the supply chains of MNEs (see chapter 7.3). Regarding the latter, the criticism concerns the fact that by far the largest part of the profits goes to MNEs in developed countries who only carry a small part of the burden, whereas very little profit goes to the people at the beginning of the supply chain, who carry the biggest part of the burden through their hard manual labor. Note that the proportional distribution of burdens and benefits constitutes a popular fairness standard, which will be discussed in chapter 4.7. However, note also that the conditions for the applicability of the standard are quite strict in that it is restricted to contexts of cooperation (see chapter 3.5.1, 3.6. and 4.7).

There is an important relation between outcome justice and procedural justice in some kinds of proceedings. In these cases, which Rawls calls cases of "pure procedural justice", just outcomes are completely tied up with procedural justice. The connection is the following: "there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed" (Rawls 1999, 75). In these cases "there is *no independent criterion* by reference to which a definite outcome can be known to be just" (ibid, emphasis added). As an illustration of pure procedural justice Rawls refers to gambling. If the gambling procedure "is fair and freely entered into under conditions that are fair", the distribution of cash after the bet is fair whatever it is. The same is true of sports competitions. Look at the example of a basketball game: if the game is procedurally just or fair, i.e. there has been no cheating or favoritism by the referee, the outcome can be considered just as well. There simply is no just outcome independent of the process of playing the game because the just result is *determined* through the process.

It should be stressed though that in both cases, procedural justice is not enough for the overall assessment of the outcome as just. Rather, as was mentioned before, the structural dimension of justice is relevant too. Analogous to the boxing match and the animal competition example, consider a hypothetical basketball game where a team of badly equipped small amateurs competes against a team of tall, perfectly equipped NBA professionals. Even if the game is procedurally just, it assumedly wouldn't be considered a „fair competition“, and this judgment concerns its background dimension: The two teams have widely divergent chances of success for structural reasons, and accordingly the competition will assumedly end with an extremely disparate result, e.g. 200 to 10. In this sense, a very uneven outcome might not be unjust *per se* (because it is a case of pure procedural justice), but it *might suggest* that there might have been flaws in the justice of the structural and / or the procedural dimensions. And if that is the case, the overall judgment of the game must probably be that it

was unfair – not because of its outcome, but because of the structural and / or procedural flaws that led to the outcome.

Coming back to the mentioned relation of pure procedural justice, just outcomes and background justice, we should note that is highly relevant with regard to questions of social justice. To illustrate this, consider how Rawls understands the relation between the three dimensions of justice in his *Theory of Justice*: “In order ... to apply the notion of pure procedural justice to distributive shares [i.e. let procedural justice determine the just outcome of distributions] it is necessary to set up and to administer impartially a just system of institutions. Only against the background of a just basic structure ... can one say that the requisite just procedure exists” (1971, 76). Rawls elaborates that just background conditions are those that ensure *equal opportunity* (see chapter 3.6.1).

In Rawls’ view, just background conditions make it possible to let people focus on procedural justice in their daily lives: “The role of the principle of fair opportunity [as Rawls’ criterion of background justice] is to insure that the system of cooperation is one of pure procedural justice. Unless it is satisfied, distributive justice [i.e. outcome justice] could not be left to take care of itself, even within a restricted range” (ibid.). In matters of social justice then, Rawls argues that just background conditions that guarantee equal opportunity are necessary to let procedural justice take care of just results.

This relation between the three dimensions of justice is highly relevant for questions of the justice and fairness of global trade. There is of course no equal opportunity for economic success among the global population. Does it follow from this that we cannot rely on procedural justice to reach just outcomes in global trade? Do we accordingly need additional criteria for just outcomes? Does it follow that striving for just global trade must primarily mean bettering the opportunities of the currently disadvantaged? Or is it that the relation between the three dimensions of justice doesn’t hold on a global scale? Does background justice mean something completely different globally than within a single society? We will deal with some of these and related questions in some detail in the section 3.7.2. Let me just note here that it is highly controversial if and how Rawls’ relation between the three dimensions of justice applies on a global scale, and what implications follow from it.

In opposition to pure procedural justice where just outcomes are determined by just procedures and background conditions, there are other cases where just outcomes are definable *independently* of process and background conditions. I will call them cases of *outcome justice*. In these cases there is an independent criterion for defining a just outcome, “a criterion defined separately from and prior to the procedure which is to be followed” (Rawls 1971, 75). Generally speaking, outcome justice is fulfilled when the people’s substantive claims, i.e. their claims to a certain outcome or, in the case of distributions, to a certain share of the benefits that are

distributed, are fulfilled or honored in the outcome of the proceeding in question.

3.5.1 Types of Outcome Justice: Cooperative Justice and Allocative Justice

In which situations, then, is outcome justice relevant? There are two classic cases. The first, which I will call cooperative justice, applies in the case of people standing in a cooperative relation to each other, with the cooperation producing certain benefits in the form of either common or public goods. In these situations, simply put, people get claims to benefits by contributing to the burdens of producing the good in question. An example for the former is a team of students preparing a presentation for which they will be graded together. A classic example for the latter is public transport, the burdens being mainly the costs to operate public transport, while the public good produced consists in the availability of public transport for everyone. In both cases, outcome justice demands that there must be a certain proportion between burdens people carry and the benefits they enjoy. This proportionality relation demands both that those who cooperatively contribute should enjoy a proportional part of the benefits, and that those who enjoy the cooperatively produced benefits should, at least *prima facie*, contribute proportionally to carrying the burdens.³³ In our examples, this means that all the students should equally contribute to the presentation, because they will be graded together, and that those who use public transport should contribute to its costs. The latter version of the principle states that those who contribute to carrying the burdens necessary to produce the benefits generated by the cooperation have a *prima facie* claim to the equal contributions of the others who enjoy the benefits. This is known as the *principle of fairness*, which will be discussed in more detail in chapter 4.7.

It is important to note that in Rawls' view, the interactions within a society are to be considered a form of cooperation, and accordingly cooperative outcome justice applies in principle: people should get shares in accordance with their contribution to society's good. In a context as complex as the interactions of a whole society though, it would be impossible to decide what this entails (and bring with it a plethora of other problems). For this practical reason, Rawls advocates that the system be set up such that it can work as one of pure procedural justice. The market as an objective, decentralized system of value distribution is to take over a substantive role in determining burdens/contributions and benefits, whereas people's chances for success in the market are to be equalized in their formative phase, and those that cannot participate successfully in the market are taken care of by the community.

Regarding questions of justice in global trade, an important question is accordingly if global trade constitutes a case of cooperation of the kind that triggers cooperative outcome justice. This relates to the questions in the last section as follows: if global trade is to be considered a form of

³³ With the exemption of those who are not *able* to contribute, like children, disabled people etc. who are usually thought to have a claim to benefits without contributing to the burdens.

cooperation in the relevant sense, the relation between the three dimensions of justice applies to global trade as well. In this case, for pure procedural justice to be relied upon for bringing about just outcomes, background justice would be necessary. Without background justice in place we would need to judge the outcomes of global trade according to the criterion of a proportional distribution of the burdens and benefits of global trade, and set up some kind of system to see to their implementation (for an suggestion in this vein see chapter 5.2.5).

And what follows if global trade doesn't qualify as cooperation in the relevant sense? Does that mean that only the demands of procedural justice apply with regard to global trade, or do we nevertheless somehow have to take background conditions into account as a demand of fairness or justice? The explanations on the relation between procedural fairness and background fairness suggest that the latter is indeed the case. As we saw, they apply as a demand of fairness even in contexts such as sporting competitions that have absolutely nothing to do with social justice. We will come back to this important finding later on.

For now, let's come back to the second case of outcome justice. *Allocative* justice applies when a given collection of burdens and benefits "is to be divided among definite individuals with known desires and needs, and when the collection to be distributed is not the product of these individuals, nor do they stand in any existing cooperative relations" (Rawls 1999, 76). Since in this case there is no "pre-history" of the distribution which generated prior desert claims on the benefits to be distributed, the just distribution will take other claim bases into account. A simple example of a case where allocative justice applies is the distribution of a birthday cake among children at a party. A just distribution will take several claim bases into account: Probably the child whose birthday it is has a prior claim based on entitlement to the biggest piece of the cake, but all the others might have an equal claim to a share of the cake. Thus the just distribution would allocate the biggest piece of cake to the birthday child and a smaller and equally sized piece to all the other children.

But what if some children don't like cake, whereas other children love it? And what if two of the guests are teenagers with a huge appetite? In other words, will a just allocative outcome take people's preferences and needs into account? Rawls seems to think so. He writes that in the case of allocative justice, it would be "natural" to distribute the benefits "according to *desires* and needs, or even to maximize the net balance of satisfaction. Justice becomes a kind of efficiency, unless equality is preferred. Suitably generalized, the allocative conception leads to the classical utilitarian view. For as we have seen, this doctrine assimilates justice to the benevolence of the impartial spectator and the latter in turn to the most efficient design." (Rawls 1999, 76, emphasis added).

I agree that distributing according to the desires of people is often natural and sensible, but it seems mistaken to me to think that justice would require this. After all, this would be the case only if we accept desires or preferences of all kinds as bases for stringent claims, and this is only plausible in certain preference utilitarian theories. While a distribution according to preferences in the case of

allocations in a claim-vacuum makes perfect sense, it is implausible from a deontological perspective to consider this a demand of morality. Clearly, some Humeans and authors like Joseph Raz consider interests of high importance as claim bases. However, not just *any* interests or preferences are relevant in this perspective, but only basic, highly important ones from an *objective* point of view. After all, if we ask what a *just* distribution would be we are not asking what shares the parties would *want subjectively*, but what shares they *should get objectively*.

It is important to note that the distributions resulting from trade are *not* a case of allocative justice, because the allocation doesn't take place in a pre-distribution claim-vacuum: the benefits that are distributed in the outcome of trade are the results of previous actions which generated claims based on entitlement. So people, companies and possibly countries go into trade with unequal claims to shares of the benefits, and just distributions of trade outcomes cannot disregard this. This suggests that a utilitarian line of argument in the sense of the intuition mentioned in chapter 3.2., namely that the workers in developing countries have claims to a bigger part of the profits of trade because the positive effect of that money on their well-being would be substantially higher than if it went to the profits of the supplier or the MNE, has to be seen as implausible. In the words of Rescher, accepting that "all men come into this world with exactly the same status regarding claims, merit, and deserts, there is no gainsaying that this situation is radically altered once men begin to act. Human actions - or at any rate, the great bulk of them - are inherently claim-modifying" (Rescher 2002, 21). So with regard to distributions from global trade we are dealing with claims on different bases, at least an important part of which is based on the previous actions of the parties. This means that the fact that distributions from trade are unequal, even highly unequal, is not enough per se to make them unjust.

At this point we will look more closely into the notions of *equality* and *equality of opportunity* that underlie some of the above issues and which we have encountered several times already. We will do this in the form of a short (and necessarily superficial) detour into these concepts and the respective theories.

3.6 Equality as an Element of Justice and Fairness

The underlying, basic idea behind both Rawls' and Rescher statements above is that all human beings are *equal*.³⁴ In the most basic sense this means that they should be seen as having equal worth or moral status, and accordingly be treated *as equals*. This idea is the basis of *Egalitarianism*, a strand of political philosophy and moral thought underlying most modern western thinking. Equality plays a pivotal role in all relevant modern theories of justice and concepts of fairness, but it does so in different ways.

³⁴ This section is mostly based on Arneson 2013.

Some theories focus on people being *treated equally*. The ideal of *formal equality of treatment* implies that people generally have a claim to be treated in the same way, requiring morally relevant reasons for differential treatment. In the terms used before, this is a requirement of *procedural justice*, and it is often linked to fairness. For example, in sports competitions referees are supposed to treat all the participants in the same way without favoritism, the law is supposed to apply to everybody in the same way etc.

Besides the *formal* outlook on equality which focuses on *treating people equally*, the question of the equality of people can also be understood in a *substantive* way, by focusing on something people should equally *have or get*. They concern what is usually called *distributive justice* – the question of the rightful distribution of certain things among people.

There is considerable controversy among different theories of justice on what it is that is to be distributed equally among people. We will shortly look into some relevant positions so we can understand their implications for questions of justice in global trade. The first position I present focuses on people having *equal chances for success* or, in other words, *equality of opportunity*. The second position focuses on *equality of negative freedom*, and the third and fourth one on *equality of positive freedom*.

3.6.1 Equality of Opportunity

A specific form of the ideal of equal chances for success is the ideal of *equality of opportunity*, which is an important form of social equality in modern western thinking. In its basic, *formal* form it requires that all people have the same chances for social positions that confer special advantages, meaning that 1. these should be open to all applicants, and that 2. the selection should be governed by the criterion of *merit* only. This implies that nobody must be disadvantaged on grounds that are irrelevant to the task in question – such as skin color, gender, place of origin etc. The according ideal of a society is a *meritocracy* – a society where people's positions are determined by their merit only. In the words of Roemer, equality of opportunity demands that in „the competition for positions in society, all individuals who possess the attributes relevant for the performance of the duties of the position in question be included in the pool of eligible candidates, and that an individual's possible occupancy of the position be judged only with respect to the relevant attributes" (Roemer 1998, 1).

Formal equality of opportunity has close intuitive connections to fairness in that it demands that people cannot be discriminated against on morally irrelevant grounds. As such, it is central to distinguish the relevant claim bases from the irrelevant one with regard to the context at hand. We will come back to this in chapter 4.

In a much more demanding form John Rawls (1971 and 2001) formulated the ideal of equality

of opportunity as a principle of *equality of fair opportunity*. It requires that society should do what it can to level the playing field among individuals during their formative periods, so that all those with relevant potential will eventually be admissible to pools of candidates competing for positions. This includes substantive support to the disadvantaged to strengthen their chances vis-à-vis those born into more fortunate circumstances. In a weak form many social states try to move closer to this ideal, by means of free public schools, scholarships for further education etc. In a strong sense though the ideal is hardly implementable, since it will never be possible to give all children exactly equally favorable environments to grow up in and develop their talents without violating other basic values.

We should note that the ideal of social equality of opportunity is not just important from a justice perspective, but also from an efficiency perspective. In the words of Banarjee/Duflo “(...) the socially efficient outcome [is]: making sure that every child gets a chance” (2011, 81), because only in this way the slumbering talents of people can fully come to flourish to the benefit of society.

With regard to debates on global fair trade, it is controversial if and how the ideal of fair equality of opportunity in a broad social perspective is a requirement of *justice* between societies. This question is discussed in the philosophical “Global Justice”-debate which is the topic of the chapter 4.7.2. However, from the perspective of *fairness* the much more restricted formal equality of opportunity with regard to participation and chances for success in particular social practices is relevant in a more general sense. As I said, we will come back to this in our discussion of different fairness standards in chapter 4.

3.6.2 Equality of Negative Freedom: The Libertarian Position

Let me turn to a position which holds that justice requires equal *negative freedom* for people – freedom for outside infringement. This is the view of the *libertarian* position (e.g. Nozick 1974), which is a version of John Locke’s theory on natural rights (Locke 1690. See chapter 3.2.). It holds that the morally required equality among people consists in every person having equal basic moral rights which give people certain absolute claims against others and thereby constrain people’s actions. In other words, for the libertarian position the basic equality among people consists in them having equal *negative* rights that require others to *abstain* from actions that would infringe these rights. We recall that they put very high value on people’s freedom, asserting people’s right to do whatever they choose with whatever they legitimately own so long as they do not violate the rights of others not to be harmed in certain ways – by force, fraud, coercion, theft, or infliction of damage on person or property. The libertarian position puts high emphasis on the legitimacy of private property, freedom of contract and the free market as a necessary condition for this freedom. Conversely, it is generally in opposition to redistribution of wealth and government regulations that curtail the free market. We will examine what the libertarian position means for the question of

distributive justice in chapter 3.7.

With regard to trade, a libertarian approach generally holds that just trade or fair trade is given when the negative rights of people are not infringed, meaning that the state doesn't interfere with the voluntary interactions between trading actors, and there is no fraud, coercion, theft, or infliction of damage on person or property. This position on the meaning of "fair trade" will be discussed in chapter 5.2.1.1 on the liberty-based line of argument for the position that "fair trade is free trade".

3.6.3 Equality of Positive Freedom: Income-Wealth Egalitarianism and Capability Approach

According to an opposing views, the relevant equality among people lies in them all having equal claims of justice not only to negative freedom, but to effective *positive* freedom – the freedom and ability to *do* certain things. This entails having a variety of options to choose from regarding one's life.

One version of this position holds that what should be equalized among people is their income and wealth. This is because in a functioning market society, having money gives one a wide variety of options: to purchase commodities and do with them whatever one likes, engage in a variety of activities etc. Accordingly, to give people equal freedom in this sense, equality of income and wealth is seen to be necessary.

However, this position has encountered serious objections. A first one is that to bring about and sustain a condition in which all people have the same amount of money would require continuous and extensive violations of people's Lockean rights, since these include the right to gain more property than others by gift, trade, or hard work (Nozick 1974, chapter 7). This relates back to what we said in chapter 3.5.1: even if everybody comes into this world with exactly the same rights, this situation is radically altered once men begin to act, because human actions are inherently claim-modifying.

A second, related objection is that liberty necessarily leads to an unequal distribution of money over time even if it is distributed equally at some point, since people will choose to act in very different ways (Walzer 1983.) . A third objection is that monetary equality would inhibit people's engagement in wealth-creating and -saving activities for lack of motivation, and would thereby reduce society's wealth making everybody worse off. Some of these problems we will examine in more detail in chapter 5.2.1 with regard to the moral arguments for free markets. They do render the wealth egalitarian position unattractive, which is important to note with regard to ideals some people might entertain with regard to a globally equal distribution of wealth.

A second, more plausible version of the position that focuses on positive freedom argues that what is morally required for society is not to create equality of income or wealth, but equality of *basic capabilities* (Sen 1980, 1992; Nussbaum 1992). Let me explain shortly what is meant by that. People

may do or be many different things – in Sen’s words, they have many different possible *functionings*. Many of these are of little importance, but others are essential for human flourishing. By *capabilities* Sen means all of the functionings that an individual is really free to choose at a time. The proposal of Sen’s approach is that what society should aim at is to get each person at or above the threshold level for every one of the capabilities that are specified to be necessary for a minimally decent or good enough life. Achievement of these basic capabilities is what should be equalized among people. Put differently, this approach advocates equal *sufficiency* for all but is open for differences above that level.

With regard to trade, an approach that understands equality or sufficiency of positive freedom as a requirement of global justice could argue that just trade or fair trade is given when the actions and decisions of trade actors and institutions are guided by these goals. For example, along these lines one could argue that justice in global trade requires international trade regimes to serve the goal of alleviating severe poverty. The latter position is held e.g. by Stiglitz/Charlton (2005) and will appear again in chapter 5.2.2 regarding the position that *fair trade is trade that serves the worst off*.

The question whether ideals of positive equality apply within societies is a question of *distributive justice*, which is the topic of the next chapter (3.7.1). The question how this looks like with regard to the global context will be discussed right after in chapter 3.7.2.

3.7 Distributive Justice

3.7.1 National Distributive Justice

When the term “justice” is used in political philosophy and political theory it is usually the realm of *distributive justice* which is referred to. Distributive justice is concerned with the distribution of benefits and/or burdens among a certain group of people. It can be understood as being about giving to each member of that group what she deserves in the context of the distribution, or, in other words, fulfill the claims of individuals in the distribution. This requires comparing claims of different individuals, and finally satisfying them as much as possible in the face of competing claims of other individuals. The latter involves, again, the idea of proportionality: if stringent claims cannot be fully fulfilled in the face of competing claims, justice demands they be fulfilled as far as possible in proportion to their strength. As Aristotle put it, it is about the proportion of the shares people get in accordance with their deserts (Aristotle, *Nicomachean Ethics*, 1131a30). This requires that the bases for stringent claims of individuals have been determined beforehand, which, as we have seen before, is done differently in different moral theories.

The most usual realm of application of distributive justice is institutional systems that distribute benefits and burdens and establish an enforceable system of claims. As such, nation states have traditionally been in the focus of questions of distributive justice. As we will see later in

more detail, it is a contested question if requirements of distributive justice apply on a global scale nowadays. This is especially salient since the most prominent and controversial question of distributive justice is if and to what extent *redistribution* from the rich to the poor members of that group is justified or called for.

A first central question with regard to distributive justice concerns the role of claims based on *desert* for just distributions. Let me sketch, very roughly, three classical, contradictory positions on the role of desert claims to elucidate what is at issue here. They are the positions of Robert Nozick, John Rawls, and Michael Walzer.

On one side of the spectrum we find the libertarian position of Robert Nozick, as presented in his book *Anarchy, State, and Utopia* (1974) – mentioned before as the position which understands justice in terms of *negative* freedom only. It is based on the Lockean account of natural rights I discussed in chapter 3.2., and closely related to the argument for the free market based on liberty that we will encounter in chapter 5.2.1.1. Nozick's argumentation is set in the framework of a set of procedural rules regulating the interactions of people, and an original distribution of goods that has come about in compliance with this set of procedural rules. Within this framework, Nozick argues that each individual should be entitled to freely do what she wants, and is entitled to reap the results of her freely chosen actions as her *just deserts*. In this view (and in front of according background conditions), everybody has a stringent claim based on entitlement on what they get as the results of their actions. The natural talents and abilities people use in coming to deserve things are something they *just have*, as consequence of a natural distribution, and people are therefore entitled to the benefits that are generated by them (Nozick 1974, 225). The natural distribution of talents and abilities may be arbitrary and undeserved, but it is not illegitimate, so why should not those who fortuitously have them benefit from them? According to the libertarian position, distributive justice accordingly demands that the property rights of people are protected, whereas it cannot demand of those who fared better to subsidize those who fared worse – after all, it was their decisions (in combination with their natural talents) that led to the according results. Redistribution (through taxes etc.) is accordingly seen as unjust.

On the other end of the spectrum we find the liberal position of John Rawls, as presented in his book *A Theory of Justice* (abbreviated ToJ) (1971). We have already examined important ideas of Rawls regarding the relation of background, procedural and outcome justice in chapter 3.5. Now we will focus on the other aspects of his theory that are relevant for our topic.

In the ToJ, the primary subject of justice is understood as being *the basic structure* of a society. In the terminology introduced earlier, the basic structure is concerned with the relevant conditions of *background justice*. The basic structure “is a public system of rules defining a scheme of activities that leads men to act together so as to produce a greater sum of benefits and assigns to each certain recognized claims to a share in the proceeds [*outcome justice*]. What a person does

depends upon what the public rules say he will be entitled to, and what a person is entitled to depends on what he does. The distribution which results is arrived at by honoring the claims determined by what persons undertake to do in the light of these legitimate expectations" (Rawls 1999, 73). The effect of the basic structure is a certain *distribution* of basic goods (which include basic rights and resources).

Rawls argues that the natural talents and abilities are not something people are responsible for and have done anything to deserve, and accordingly they don't have a claim on the benefits generated by them either. To allow the distribution of primary social goods to be determined by natural talents and abilities, he argues, means to let people's life prospects be determined by factors that are arbitrary from a moral point of view, i.e. that have no moral justification. Instead, Rawls argues, people should agree "to regard the distribution of natural talents as a common asset and to share in this distribution whatever it turns out to be" (Rawls 1971, 101). Distributive justice accordingly demands redistribution through taxes etc.

Let's have a closer look at the method Rawls uses for deriving what he calls a just basic structure in the case of a (national) society, and at what he identifies as the traits of a just basic structure.

The method Rawls uses for deriving principles of justice is a famous thought experiment regarding rational equals who agree on the basic principles of justice that their society should be based on through an impartial process. Imagine a hypothetical contract situation, the so called „original position“, where rational individuals representing different groups of society decide about the basic structure of their society. They do so behind a „veil of ignorance“, meaning that they don't know to which group they belong, and therefore cannot try to influence the design of the basic structure in a way that favors their particular interests.

Rather, they have to find a basic structure that favors all as much as possible, since they hypothetically could end up as member of any group of society.

The „veil of ignorance“, which constitutes the basic methodological idea of Rawls' ToJ, is a device for guaranteeing fair results of the hypothetical negotiation in the original position. Because of this methodological role of fairness, Rawls calls his theory "justice as fairness". Note that the concept of fairness in play conceives of fairness as impartiality (see chapter 4.2.).

Rawls argues that the principles of justice the representatives would choose behind the veil of ignorance are the following: the first principle, which has lexical priority over the second, holds that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others" (Rawls 1971, 60). These basic liberties of citizens include the political liberty to vote and run for office, freedom of speech and assembly, freedom of conscience, freedom of personal property, and freedom from arbitrary arrest.

The second principle has two parts (Rawls, 1971, 303), holding that social and economic inequalities are to be arranged in a way so that: (a) they are of the greatest benefit to the least-

advantaged members of society (*the difference principle*), and (b) offices and positions are open to everyone under conditions of *fair equality of opportunity*. This is the liberal *principle of fair equality of opportunity* that we have encountered before. Both of these principles are often mentioned in debates on just or fair global trade, and we will come back to how they apply there in chapter 3.7.2.

The third approach concerning the role of desert for distributive justice is the one Michael Walzer elaborated in his 1983 book “Spheres of Justice: A Defense of Pluralism and Equality”. Walzer argues that there is not *one* principle of just distribution (related to what we called “claim base” before), but rather that there are *several*, depending on which social “sphere” is at issue. The principles of distribution Walzer mentions are *free exchange*, *desert*, and *need*. The social spheres and the according principles of distribution are the following: *free exchange* is the just distributive principle for the sphere of *money and commodities*, *desert* is the just distributive principle for the sphere of *recognition* (including offices, punishment etc.), and *need* is the just distributive principle for the sphere of *welfare and security*. For the realm of trade, this means that according to Walzer, free exchange is, in principle, the just principle of distribution, whereas desert and need play no role there. This implies that there are no independent claim bases in transaction that could serve as criteria for outcome justice, and accordingly justice in exchanges is conceived in purely procedural way.

It is relevant to note that Walzer conceived his theory for national societies, and that he assumed that the other spheres are properly addressed by the according institutions. In the realm of global trade this is notoriously not the case. Nevertheless, this division into spheres is one way how to argue that free exchange is the just distributive principle with regard to global trade, and that need and desert, while they should be addressed by different institutions, play no significant role there. It stays to be determined what this means in non-ideal theory, i.e. where such institutions are absent.

For now though let us turn to the question how the depicted theories of domestic egalitarian justice can be transferred to the global level and what implications this has for understandings just and fair global trade. We will start with Rawls’ theory of justice, because it heavily influences debates on “fair trade”, both explicitly and implicitly.

3.7.2 The Perspective of Distributive Justice on Global Trade

With regard to the application of Rawls’ theory of justice to the global realm, an important question concerns relation between the three dimensions of justice as depicted in chapter 3. Assuming that it is correct, and in a very general sense transferable from the national to the global level, just global trade could be understood in the sense of *procedurally just trade in front of just global background conditions*. The important question in this perspective then is: what does global background justice

amount to?

Framed this way, the debate on just global trade has to be understood in the broader context of the so called *Global Justice* (GJ) debate in political philosophy. In the following I will briefly sketch the basic controversy and important positions of the debate.³⁵

The basic question of the Global Justice debate is if distributive justice is required or possible only within national societies, or if the world as a *whole* constitutes a context of justice too. Simply put, the former is the „nationalist“ position, the latter the „cosmopolitan“ position (from *cosmo-polis* = the world polity).

Adherents of a nationalist perspective claim that for various reasons, distributive justice can only be sensibly conceived within a nation state, whereas it is not an issue globally. In this view, a state is seen as the precondition for the application of egalitarian justice, since it puts the co-nationals or citizens in a relationship to one another that generates *associative duties of justice*, particularly duties of socio-economic egalitarian justice (Nagel 2005). Rawls himself argued that, when the thought experiment of the original position is repeated on the international level, not individuals, but nation-states have to be seen as the parties agreeing on the terms of their future co-operation, and that the principles of international justice derived with the help of the veil of ignorance (non-intervention, self-determination, *pacta sunt servanda*, etc.) are analogues only of the first of his justice principles (Rawls 2002, 378-380). On the other hand, the second principle (of which part (a) is the difference principle) only applies to particular societies and has no application in the international context (in the simplified vocabulary used here, Rawls is therefore to be seen as a „nationalist“). In this view, people only have duties of egalitarian justice towards their co-nationals, but not towards outsiders. Accordingly, socio-economic inequalities, which might be in need of justification within countries, are not in need of justification on a global scale (e.g. Rawls 1971; cf. Miller 1995 and Nagel 2005).

Put in a simplified way, in the nationalist perspective, disparities in the “background conditions” of global trade are not in principle seen as problematic from the perspective of justice, and neither is *outcome* justice of global trade seen as something to worry about. In other words, the only justice dimension of relevance to nationalists with regard to global trade is procedural justice, while background and outcome justice on a global level are considered irrelevant. On the level of trade practices of MNE’s, to many nationalists just or fair international trade accordingly usually means solely *procedurally* just trade in the sense discussed before.

On the level of trade policies of states, the nationalist perspective asks for procedural justice among nation states (e.g. when negotiating bilateral treaties), and implies that it is legitimate that a just trade policy of a country is to serve first and foremost its own citizens. In this view of course, not only the industrialized countries but *every* country has the right and duty to devise its trade policy

³⁵ For an helpful overview on the debate see Blake 2005.

in this way. On the level of the world trading system, again, the nationalist's focus would be on fair processes when nation states negotiate the rules for international trade within the WTO. Nationalists would consider it completely just that what takes place are tough negotiations among governments with the interests of their own citizens in mind, but moral nationalists would object in the name of justice to attempts to cheat or coerce other delegates. With the focus of justice being on the procedural dimension, the main remaining question is what the demands are for negotiations to qualify as procedurally fair. We will have a closer look at this in chapter 5.1.

Above that, many argue that there is a duty to "further just arrangements not yet established" in the international realm (Rawls 1999, 99). This can be based on Rawls methodology, but it can also be based on the general duty to *recognize others as equals* and the need to institutionally secure such relationships of mutual recognition as equals (e.g. Lister 2011; Wallimann-Helmer 2011).

For now though let us quickly look at how the nationalist perspective on global justice can be justified. There are three main lines of argument that are used to defend a nationalist perspective: a communitarian one (e.g. McIntyre 1981, Taylor 1985, Sandel 1996), a liberal nationalist one (e.g. Miller 1995, Tamir 1993), and an institutional one (e.g. Nagel 2005).

The communitarian line of argument maintains that socio-cultural connections are the source and the natural context of morality. Human beings are understood as "embedded selves" (Sandel 1996, 50ff.) whose moral world view, vision of the "good life" and identity is essentially determined by the community they grow up in. On this background, shared communal life is also understood as the basis of moral duties, which the members of a community owe to each other. Outsiders on the other hand are not owed comparable things, and accordingly the world as a whole is not seen as a context of justice. However, since globalization is leading to ever closer global ties between people in the economic, cultural, social and medial realm, the picture of closed-off cultural communities has become rather implausible, and so has the negation of any global duties on the communitarians own account. Accordingly, most communitarians today accept that at least certain minimal moral duties exist on a global scale. However, they stop far short of global distributive justice (see Bleisch 2010, 46).

The focus of liberal nationalists is less on the communities themselves and more on their functional role for the individuals living within them. Thriving cultural communities are seen as highly valuable und important for individuals since they offer a context in which sensible and good lives can be lived. The special connections co-nationals have with each other naturally make them partial towards members of their own community, which is seen as valuable because it leads them to do demanding things for each other. These special ties between co-nationals are a prerequisite for solidarity among them, which in turn is the basis of distributive justice (Miller 1995, 1999; Tamir 1993). This solidarity does not exist on a global level, so distributive justice has no place there.

For both communitarians and liberal nationalists, attempts to get to global distributive justice would be considered to be both unnatural and harmful to national communities since they erode their cohesion and ability to fulfill their vital role for their members (ibid). Besides, national communities are seen as primarily responsible for their own faring and not that of others (although they might have certain duties towards them too).

What I want to call the institutional line of argument for a nationalist position on the question of global justice centers on the role of institutions. It maintains that the prerequisite for justice to apply is the submission of a group of people under a shared *coercive* system of rules and laws with institutions able to *enforce* them (Nagel 2005). The reason is that people owe justification to those that are coerced by their institutions, and this justification is only possible if the system is just. The coercive institutional setting which generates the demand for justice is, according to Nagel, currently (and into the foreseeable future) only given in existing nation states and not on a global level, so the concept of justice does apply to nation states, but not globally.

A similar stance is taken by Risse (2007) and Kurjanska/Risse (2008) in their papers on fairness in trade, which are basically about fair trade policy of countries (see chapter 6). Risse argues that “fairness applies differently within and across states” (2007, 359) because within countries there is a shared legal corpus, with regard to trade especially property law and market regulations, which “must be justifiable to all it coerces” (ibid). Accordingly, Risse and Kurjaska are to be counted as nationalists on institutional grounds in the Global Justice debate. Since Kurjanska/Risse understand fairness to be about what people owe to others, and since this might differ with regard to citizens and non-citizens, their view on fair international trade is directly linked to the Global Justice debate, since what people owe to co-nationals versus what they owe to strangers is linked to the position one takes in that debate.

The counter position to the nationalist one on the topic of global justice is the cosmopolitan perspective. It holds that the world as a whole *does* constitute a context of justice. There are two main bases for this position: One, which is sometimes called *Globalism* (e.g. Forst 2002), maintains that the principles of justice are to be applied on a global level *insofar* as there are (empirically) global institutions. The other, *Cosmopolitanism* in the narrow sense, maintains that principles of justice apply globally since their focus is individual human beings everywhere in the world, be there according global institutions or not (cf. Bleisch 2010, 218, FN 6).

Cosmopolitans usually argue in one of two ways: either in a comparative perspective that global *inequalities* are unjust, or in an absolute perspective that *severe poverty as a human rights violation* as such constitutes an injustice.

The former position is based on the view that global equality is something desirable and that global inequalities are in need of justification. Usually it is argued that global inequalities are unjust in virtue of leading to unequal life opportunities for people for morally irrelevant reasons, the country of birth being a question of luck and not of desert, analogous to social class with respect to national

societies. That this unjust situation must be changed is usually justified by transferring Rawls' original position to a global level, with representatives of all countries (or individuals) agreeing on principles for their cooperation under the specified impartial conditions.

Accordingly, cosmopolitans and liberal nationalists are divided by their answers to the question if this thought experiment of the original position for determining just institutions can (or must) be transferred to the global level, and if yes, which actors are to be involved in the original position at the global level (individuals or states). The cosmopolitan claim has it that the original position should be transferred to a global level, with representatives of all countries (or even individuals) impartially agreeing on principles for their cooperation. They argue that these representatives of global humanity would agree on something like a global difference principle (Pogge 1989, Beitz 1979, Scanlon 1973). One could of course also agree on the methodological procedure and the setting, but argue that individuals behind the veil of ignorance would arrive at more minimalistic principles on the global level. It could be argued for example, very plausibly in my view, that they would minimally arrive at a principle that requires sufficiency for all of the world's population.

One can also arrive at the position that sufficiency is a requirement of global justice in another, more direct way, by arguing that severe poverty as a human rights violation is to be seen as the main ethical problem that needs to be redressed as a requirement of global justice.

However we arrive at this conclusion: the view that severe poverty is an extremely weighty moral problem is undisputed. Without arguing for it here, I take the claim that sufficiency is a minimal requirement of global justice to be a highly plausible position. But even agreeing that global sufficiency is a requirement of justice (or morality) leaves at least two basic questions open: first the question of *how* to bring the desired outcome about, and second the question of *who* is responsible for bringing it about. Let me mention a few points only in a non-systematic order regarding these vast questions and their relation to global trade.

First, one can advocate global sufficiency but argue that it is not the role of global trade, but rather of political institutions (national, regional or global) to bring it about, e.g. by providing for everybody's basic needs in the vein of social aid if necessary. In this view, trade should do what it is best at, namely enhancing the size of the economic pie, whereas distributing parts of it according to a sufficiency based ideal of global justice should fall to other actors, most plausibly the states. If so, we need to advance an argument for the claim that it is the states' duty to form some kinds of global institutions that are concerned with the distribution of wealth according to the sufficiency ideal.

In the absence of such global institutions, could a sufficiency position on global justice be reason enough for arguing that MNEs have the duty to pay living wages which ensure sufficiency? We could for example try to argue that powerful economic actors like MNEs have the duty to fulfil the sufficiency ideal in their realm of influence by paying their employees living wages as a requirement of

global justice. However, this line of argument is confronted with the same problem, namely that it remains to show why it should fall on companies to fulfill these positive duties. We would therefore need an argument showing that it is their responsibility to do so. We will come back to this in chapter 7.

Second, whether one takes a sufficiency position in the global justice debate or a completely different one, one sensible understanding of *just global trade* is *procedurally just trade in front of just global background conditions*. If someone assumes that current global background conditions are just, he might accordingly argue in this vein that just global trade in the current situation amounts to procedurally just global trade. If one relies on this connection and assumes that current global background conditions are *unjust*, procedurally just trade is not enough to assure the justice of global trade. This can lead to two conclusions: First it can be argued that there simply can be no just trade in front of unjust background conditions, and that what justice in trade actually requires is only working politically towards more just global background conditions. Everything else, so the argument, misses the actual issue of justice in trade. This position is sometimes taken by cosmopolitan political philosophers (e.g. Bleisch 2010).

Second, it could be argued that for just trade in the current non-ideal situation, some additional criteria regarding the justice or fairness of trade are necessary, probably concerning its outcomes. In this sense, one could argue in an egalitarian vein that for just trade, trade outcomes must be such as to minimize or at least not *widen* the global inequalities among people, or one could argue in a sufficientarian vein that they must improve or at least not worsen the state of the world from a sufficiency point of view. Accordingly it could be argued that certain or all the actors involved in global trade, from governments to companies to consumers, have a duty to contribute to these just outcomes in the context of their trade actions.

Assuming for the sake of the argument that this is true, there are still widely different opinions on how global trade best contributes to global equality or sufficiency. Some argue that global *free trade* is the most powerful means to this end (chapter 5.2.1). Others argue that free trade must be mediated globally to contribute to this goal (chapter 5.2.2). Others again argue that trade along the lines of the Fair Trade System is what contributes best to this goal. What all these positions have in common is that they understand just global trade as trade that contributes to a just world.

With this we will leave the topic of global distributive justice and turn to a subject that is at the very heart of fairness in trade between economic actors, namely commutative justice.

3.8 Commutative Justice

Commutative justice is the traditional concept concerned with just exchanges between trading actors. It can be understood as being about giving to each person what she deserves in the context of an exchange. Commutative justice is accordingly about the outcome dimension of trade. According

to Aristotle, justice in exchange requires us to abstract from the specific characteristics of the persons who are exchanging and focus solely on what is exchanged. The principle which applies is that of *strict reciprocity*, or in Aristotelian terms *arithmetic equality* (i.e. equal shares for the exchanging parties) (Aristotle, NE, book V). In this sense, the underlying idea of commutative justice is very simple and at first sight intuitively appealing: transactions are judged to be just when the items exchanged are of equal value.

The relevant ethical principle behind the idea of commutative justice then is the *principle of equivalence*. It states that in an exchange one is entitled to getting the equivalent value of the good or service one provides. More generally put, the principle of equivalence claims that in exchanges a proportionality relation must be observed: the gains and costs of one party must be proportional to the gains and costs of the other party. A transaction accordingly is seen as being substantively unfair when significantly unequal values are exchanged and thereby the principle of equivalence with its idea of proportionality is violated.

An important traditional theory concerned with commutative justice is the doctrine of the "just price". Having its roots in ancient Greek philosophy, it was prominently advanced by Thomas Aquinas on the background of medieval Christian ethics. In its most developed form, the doctrine was based on the Golden Rule "do unto others as you would have them do unto you", which Aquinas interpreted as implying that one should trade value for equal value. He argued that it was immoral to gain financially without actually trading something that one had created, and that charging interest on loans was „usury“ and constituted a type of theft since it did just that.

Above that, Aquinas argued that it is immoral to raise prices in response to high demand, and particularly when faced with a buyer who had an urgent need for what was being sold and would therefore accept to pay a higher price:

Si vero aliquis multum iuvetur ex re alterius quam accepit, ille vero qui vendidit non damnificatur carendo re illa, non debet eam supervendere. Quia utilitas quae alteri accrescit non est ex vendente, sed ex conditione eementis, nullus autem debet vendere alteri quod non est suum. . .

If someone would be greatly helped by something belonging to someone else, and the seller not similarly harmed by losing it, the seller must not sell for a higher price: because the usefulness that goes to the buyer comes not from the seller, but from the buyer's needy condition: no one ought to sell something that doesn't belong to him.

— *Summa Theologiae*, 2-2, q. 77, art. 1

In this sense, Aquinas condemned for example practices such as raising the price of building supplies in the wake of a natural disaster. He argued that to take advantage of potential buyers' increased willingness to pay for building materials (based on the increased demand caused by the destruction of

buildings) constituted a kind of theft since the cost of the seller stayed the same whatever the demand.

The School of Salamanca, which studied the question of the just price extensively during the sixteenth and seventeenth century, argued that the just price is determined by the fundamental standard of commutative justice, namely equivalence of value, and that the best indicator of the value of a good is the price it fetches in an open market (Elegido 2009, 29). This is already basically the view of subjective value theory.

3.8.1 The Principle of Equivalence and Subjective Value Theory

In economics it is nowadays accepted that the theory which best explains descriptively the coming about of the exchange value of goods or services is *subjective value theory*. According to it, the value of things is a function of the sum of the *subjective preferences* of people which lead to demand for the good in question, and the available supply respectively scarcity of that good. This ratio is expressed by the market price of the good or service in question. The relevant value of a good in this perspective then is its *exchange value* which is equivalent to its market price and which is determined uniquely by the average of what others are ready to pay for it on a free market. This double function of money in a market economy is expressed by Walzer when he writes: „Money is both the measure of equivalence and the means of exchange; these are the proper functions of money“ (Walzer 1983, 104). Note that, of course, the average of the subjective value people put on something can differ widely from the individual subjective value a particular person in a particular situation places on that same thing.

On the background of a theory of value based on subjective preferences, the principle of equivalence and accordingly the outcome justice of a transaction are fulfilled when the market price is asked and paid for a good. As Koslowski writes, the „equivalence of service and service in return expresses itself in the equivalence of the market value of the service and its price“ (Koslowski 1988, 228).

This has relevant ethical implications: someone selling something for a price substantively above the market price, taking advantage of a person's high subjective valuing of that item at a specific time – for example in a situation of need, with the seller having a temporary quasi-monopoly on selling the item – could therefore be said to violate the outcome justice of transactions. This would apply for example to the case of a shopkeeper raising the price for a fire-extinguisher to the double of the usual market price when the neighboring housing district is burning. The same could be said of someone profiting from need by buying something relevantly cheaper than the market price, as in the case of someone who buys, say, a piece of jewelry of someone in urgent need of money for his relative's medical treatment for much less than the market price (cf. Wertheimer 2008). As these examples suggest Wertheimer's hypothetical market criterion works well in the case of monopolies.

Now although this market economy interpretation of the principle of equivalence enables us to identify the substantive injustice of certain transactions, it does not capture all our moral intuitions concerning possible substantive injustices of transactions.³⁶ To take an example relevant in our context: a transaction where party A (e.g. a farmer in a developing country) supplies a product produced by hard work to party B (e.g. an MNE) who makes high profits with his product, but doesn't get paid enough for subsistence in return since the market price of that commodity is currently on a very low level, seems at least questionable with respect to the substantive justice of the transaction. Or, to take another example, if a profitable company in a region of high unemployment employs workers to an extremely low salary and lets them work very long hours, it seems doubtful as well if this qualifies as just simply because the market value of unskilled work in the region is extremely low. In cases like these, the fact that the market price is paid doesn't dissolve the moral discomfort we feel concerning the justice of the transactions. The reason for this might be that when there is a disproportion in the outcome of transactions this violates the idea of proportionality behind the principle of equivalence, and thereby commutative justice. But how can this be accounted for?

One way would be to argue that some morally important factors are lacking in the way the market value of goods and services is determined. Accordingly, it could be argued that the market value of goods and services should include different or at least additional elements besides the average subjective value people place on it. To explore this possibility we will turn to another kind of value theory.

3.8.2 Objective Value Theory

As we said, when understood as based on economic subjective value theory, the principle of equivalence only takes into account the *exchange value* of a good in the form of its market price. It is intuitively alluring to think that to capture the disproportion mentioned above, the additional element that should go into the market price of a good has something to do with its *production*. In other words, it could be tried to argue that instead of or besides its exchange value, the market price of a good or service should also take into account its *production value*, thereby accounting for the input that went into the production of the good consisting of labor, resources and energy.

The idea of the just price is usually thought to do just that: it ties the price of a good to the costs of its production. In this vein, Suranovic writes: "A price for a good is fair if it is approximately equal to the cost of producing it, where the cost includes a reasonable return for the seller's services. An unfair price occurs if the seller sells the product for a price which significantly exceeds the cost,

³⁶ For a detailed critique of the hypothetical market approach see e.g. Sample 2003, chapter 1.

or if the price is significantly below the cost” (Suranovic 2000, 298).³⁷

To express the dimension of the production value in a way that is not expressed in market terms itself (as consisting of the market prices of the inputs including material, labor etc.) it would have to be based on an *objective measure* of those inputs, based on an *intrinsic value theory*.³⁸ Such an outlook attributes an *objective* value to a product and thus delivers an objective criterion of its value independent of subjective preferences. As such an objective criterion to define the production value of a good or service, the average labor time that goes into the production of the good (Marx [1865],1996) has been suggested, multiplied by a quality factor for the labor (Lasalle 1863), or combined with a factor of “suffering” in the process of work (cf. Smith 1976).

The explanative version of objective value theory has been discredited, since it is faced with grave problems. To mention just a few, it cannot plausibly explain the value of found natural objects, of rare goods, or of aged objects (such as antiques), since no substantive labor has been spent on them that could explain its value. Moreover the labor theory of value tends to become circular when confronted with more than one input factor. This led Nozick to claiming that this incoherence can only be avoided by resorting to a market price theory of value (Nozick 1974, chapter 8).

So it is not the explanative versions of objective value theory but the prescriptive or normative versions of objective value theory that are interesting for questions of just commutative trade, which focus on how much someone *should* receive in return for their labor or goods. One such prescriptive labor theory of value was defended by Josiah Warren in the 19th century (Warren 1852). Starting from Adam Smith’s principle that labor is the true measure of price, he claimed that the just compensation for labor or its product could only be an equivalent amount of labor (or a product which embodies such an equivalent amount of labor). In the tradition of Adam Smith he considered the “cost” of labor to be the subjective cost to the worker, i.e. the amount of “suffering” involved in work (cf. Smith 1776). In an attempt to include additional relevant factors, Arghiri Emmanuel (1972) argued that labor has different levels of skill and intensity, which have to be taken into account when the value of a product is estimated. So if the labor performed by a worker in a developed country were, say, three times as skilled and intense as the labor performed by a farmer in a developing country, the principle of equivalence requires that their products should exchange at a ratio of three to one (Emmanuel argues for this by way of the relative wages that each is able to command). The fact that in reality the ratio is much higher still means that the

³⁷ Interestingly, medieval writers contrasted the “just price” (*iustum pretium*) with the “natural price” (*verum pretium*) derived from Stoic philosophy. The latter was any price agreed to by willing seller and willing buyer. The natural price thus corresponds to the exchange value in free market transactions (see Glaeser 1957; cf. Suranovic 2000, 298).

³⁸ So called *labor theories of value*, which define value with reference to the necessary time needed to produce the good in question, prevailed in different forms in classical economics with theorists such as Adam Smith and David Ricardo, an important exponent being also Karl Marx.

principle of equivalence is violated in the exchanges (ibid., cf. Miller 2010, 17).

The proportionality relation required by the principle of equivalence focuses usually on single transactions or work contracts. It requires that if A worked x hours (multiplied by additional factors like quality, skill etc. of his work), he should be paid x multiplied by y pounds/dollars etc., whereby y constitutes the adequate pay for his kind of work per hour.

According to labor theory of value accounts however, the adequate pay would have to be specified without being able to return to the market price. This is of course a highly elusive and complicated endeavor. It would require setting up a whole system of the value of different jobs within a society in relation to each other, according to a criterion (e.g. social utility), translated into monetary terms. How socially valuable exactly is the labor of an artist compared to the labor of a nurse compared to the labor of a professor compared to the labor of a cleaner compared to the labor of an engineer? Besides this problem of the assessment of different kinds of work, how do we extend this *across* the borders of particular societies? Are different wage levels justified by different living costs in different geographic areas? How should the contribution of capital to the production be weighed, including a legitimate interest rate? How should the founder's credit for his idea and organization of the business be weighed? Another problem with accounts such as the above is that efficiency usually does not figure in them. Thus Emmanuel's concept has been criticized on the basis that the wage inequalities he points to are actually closely correlated with differences in productivity, which are presumably measured in terms of the prices at which products exchange on the international market (cf. Miller 2010, 18; Barrat Brown 1993, 43).

As becomes clear from these questions, approaches based on some form of the labor theory of value have the clear downside that must rely on several precarious estimates, whereas the market price offers an objective measure of value.

Apart from the difficulties of devising a system in the above sense, we must note that it would undermine some highly useful functions of the market. Let me just mention one at this point: The market acts to coordinate demand and supply of goods and services by means of (pure) market prices. Simply put, this works as follows: When there is an overproduction of a certain good or service, prices for that good or service go down since there is more supply than demand. The lower prices give lower incentives to produce the good in question, leading to less being produced, which leads to the overproduction going back and adjusting to the demand. On the other hand, when there is an underproduction of a certain good, market prices for that good go up, which gives higher incentives for producing that good, leading to more being produced and the underproduction going up and adjusting to the demand. In this way, pure market prices coordinate demand and supply in a decentralized, "natural" way, which is highly useful for society. If actual prices were to be determined by an "objective" theory of value, the coordination of supply and demand would have to be brought about by other mechanisms, which implies weighty problems. The badly failed attempts

of historical socialist regimes to coordinate supply and demand in a centralized way demonstrate this vividly. In chapter 5.2.1 we will come back to this and additional functions of the market when the arguments for free markets are explored.

This is not the last word on the relevance of this issue for the topic of “fair trade” though. In chapter 7.3 I will present an attempt to include production inputs into fair wages and prices not across the whole economy, but across the supply chains of MNEs. I will, however, conclude that this is far too complicated to be practicable. What the last paragraphs should have shown preliminarily though is that it is very difficult to argue against the claim that market prices for goods and services are a sensible measure for the principle of equivalence demanded by commutative justice.

3.9 Intergenerational Justice and Position 1) Fair Trade is Trade that Respects the Claims of Future Generations

Lastly, I want to consider the perspective of intergenerational justice on trade. There is actually a first position on fair trade that I want to discuss under this heading, namely the position *fair trade is trade that respects the claims of future generations*. Since it doesn't fit into my categorization of Part II, I discuss it here together with the corresponding dimension of justice. The position is denominated *position 1)* whereas all the other positions are denominated with letters from a) to j). However, this special “status” of position 1) is quite fitting since it is relevant with regard to all the levels of analysis discussed in Part II, and takes a perspective that is often forgotten in the debates on fair trade, although it is highly important from an ethical perspective.

Intergenerational justice is a wide topic of its own on which a lot has been written lately.³⁹ My aim in this section is clearly not to present the according vast debate, but merely to point out how intergenerational justice can generally be understood as being related to questions of “fair trade”.

Position 1) *fair trade is trade that respects the claims of future generations* is defended by Boda (2001), who claims that “intergenerational justice requires that trade meet some more specific criteria in order to be considered fair” (Boda 2001, 27). He argues that our moral responsibilities to future generations imply that we need to transform trade in a way that leads to “sustainable development” and that the free trade dogma has to be complemented with guiding principle that ensure the legitimate claims of future generations are respected.

Formulated as a claim about fair trade, the position reads: *trade is fair if it respects the claims of future generations*. The basic argument goes as follows:

(P1) Trade is fair if it respects the claims of future generations

(P2) Trade respects the claims of future generations if it is sustainable

(C) Trade is fair if it is sustainable

³⁹ For an excellent introduction to intergenerational justice see Gosseries / Meyer 2009.

(P1) is to be understood as a necessary but not sufficient condition for trade to qualify as fair in a broad sense.

In my terminology, this position concerns both *just trade* and *ethical trade*, since it concerns the fulfillment of stringent claims which both institutions and individual economic actors have a duty to fulfill. The duty they have to comply with is the duty to structure and practice trade in a way that respects the claims of future generations to an intact environment. In terms of analytical classification position 1) is concerned with the *outcomes* of trade.

So, what are the ethical bases of position 1)? The second part of (P1) states the basic assumption of the perspective of intergenerational justice, namely that it is not only the people living today who have ethically relevant claims that must be respected, but also the people that will follow us on this earth as part of future generations. If one accepts that future generations have claims on us at all, which is plausible in my view, we all must refrain from activities that violate those claims, or put their fulfillment in serious jeopardy. And this is true for trading activities too, as the first part of (P1) claims. Actually, this is crucial, because in our current context of profit-maximizing capitalism, trade and the activities it is based on notoriously contribute massively to the destruction of nature. And nature is the basis of future generations' survival. So, (P2) states that to respect the claims of future generations trade has to be sustainable in the sense of us leaving the planet to future generations in a condition that can ensure their continued survival and good life.

Sustainability as a demand of intergenerational justice implies that future human beings have stringent claims vis-à-vis the people living today, and one of these claims is that present generations may not pursue policies that create benefits for themselves without regard to the costs on those who will live in the future. A prime example is of course an unsustainable exploitation of the environment, which generates benefits for the current generation while imposing the cost of a destroyed environment on future generations.

Boda argues that since the "free trade dogma" for international trade has led to the massive destruction of natural resources which endanger the lives of future generations, it has to be adjusted. But in what ways should this happen so the demands of intergenerational justice are satisfied? Boda argues in line with ecological economists like Gowdy/McDaniel (1995) and Daly (1993) that in order to achieve sustainable development, international trade should be on the one hand more *regulated* in terms of social and environmental standards, and on the other hand also *reduced* in absolute terms. The former claim is rather uncontroversial, but the latter one is in need of further explanation. Boda argues that intergenerational justice demands that global trade must be reduced in absolute terms because some inherent features of it *per se* impede long term sustainability. He bases this claim on the following main considerations:

1. In the context of the highly competitive global market it is extremely difficult to make

businesses pay for the external (environmental) costs of their operations. While an effective global environmental policy could internalize these external costs in theory, this is very hard to put into practice.

2. Specialization to particular kinds of plants and animals which enhances efficiency leads to a homogenization and an ensuing massive loss of biological diversity (Noorgard 1988).⁴⁰

3. According to Gowdy (1995) and Daly (1994) historical evidence suggests that in times of intensive international trade both local and global revenue inequalities increase. These inequalities are then transformed into unequal access to environmental resources, creating a special type of deprivation (Lipietz 1995), which in turn makes it difficult to implement any efficient environmental policy. An example would be poor people cutting down scarce trees in natural reserves for their survival.

4. The ever growing global economy is too big for the capacity of the natural eco-systems. Since according to free trade theory trade fuels economic growth, it is problematic from an ecological point of view since this growth is not limited in time by the carrying capacity of the natural eco-systems. Rather as Daly/Goodland (1994) argue, sustainability requires a radical cutback of the throughput (including energy and material flow) of the economy. In theory this cutback could be achieved by technological development and more efficient resource use, but in reality up to now any increase in energy efficiency has been eaten up by absolute increase in energy use. This leads Boda to argue that the only way to cut the energy and material use back is to reduce the level of present production and consumption "through a radical restructuring and reorientation of economic activities" (Boda 2001, 25) back to the local level.

5. Increased trade increases transportation which contributes to environmental problems (on the local as well as the global level).

6. The current global economy is based on operations that are separated in time and space. Because of the psychological phenomenon of spatial and temporary discounting people hardly give due weight to the consequences of actions that occur somewhere else or in the future. And because we cannot exactly know what would be the ecological criteria of long term sustainability, Boda argues that we must act in the spirit of the precautionary principle, that is, we must avoid any action which *might* be harmful to the eco-system. Therefore achieving sustainability cannot be guaranteed only through meeting some ecological (quantifiable) thresholds, but through securing the *institutional conditions* of long term sustainability. This means according to Boda that small scale and *local* activities should be predominant over large scale and global activities. The predominance of local economic activities might not be a sufficient, but is according to him a necessary condition of achieving sustainable development (Boda 2001, 25, cf. Gowdy 1995, Redcliff 1992, Ghai/Vivian 1992).

⁴⁰ Scientists estimate that in the past twenty years several thousands of plant varieties have disappeared as a consequence of the extensive use of some specifically bred new plant varieties (Gowdy 1995).

Without being able to go into theories of intergenerational justice here, I assume the claim of future generations to an intact environment to be highly plausible. I also agree with Boda that concerns of intergenerational justice must be included in an encompassing ethical assessment of global trade. And I share his concerns voiced in the points above.

However, I think that the question about the right means to this end might be answered differently. Assuming that global trade does in fact lead to global raising living standards, this important benefit is a weighty reason against going back to mainly local economies. I would accordingly argue that we might try to find *other* means for ensuring the sustainability of global trade. If this is not possible, then I agree with Boda that we would have to localize our economies again.

Although I cannot develop this further here, as I see it, there are mostly two courses of action to be pursued: 1) strict global regimes regarding the internalization of environmental costs; and 2) massive investment in technological solutions aimed at reducing the environmental impact on all stages of the supply chains to close to zero. The latter includes energy and raw materials from renewable sources, technological solutions to avoid pollution (such as meticulous cleaning of water used by the industry etc.).

With this, we will leave our reflections on the aspects and dimensions of the concept of justice of relevance for normative questions of global trade. In the next step, we will finally turn to examining the specific moral fairness concept.

4. Fairness

Let us start with the *contexts* where specific moral fairness questions arise. These contexts are very broad, ranging from games and sporting competitions to education, politics, administration and jurisdiction, to economic activities like bargaining, to everyday activities like queuing etc. Nevertheless, they have certain characteristics in common. Their common denominator is that they are *contest contexts* in a broad sense where comparative advantages or the avoidance of comparative losses can be sought at the expense of others (cf. Carr 2000). Examples where this is easily visible are the distribution of limited goods, the awarding of prizes and offices, and the assessment of comparative desert.

Although empirically many people share agreement with regard to judgments of unfairness, the precise content of the concept of specific moral fairness is hard to grasp (cf. Finkel 2001, Carr 2000). As we said above, the concept of specific moral fairness implies the absence of *specific kinds of moral flaws* that consist in certain morally connoted transgressions, breaches or violations of certain moral standards, while the antonym *unfairness* implies that some of those standards are violated and morally connoted transgressions, breaches etc. are present (Carr 2000, 9). But what exactly are the relevant moral fairness standards? And where do they apply?

There is considerable controversy with regard to the correct answer to this question, and

different authors suggest different standards. Suranovic (2000) for example provides seven fairness principles that he infers from usages of fairness in social and public policy settings (Suranovic 2000, 286). He argues that it is impossible to clearly distinguish between considerations of general morality, justice and fairness, and recognizes that his principles incorporate elements of all three. Further, he claims that these principles are all plausible in their own right and it is not sensible to argue that some are mistaken while others are correct.

Suranovic distinguishes broadly between what he calls a) equality fairness and b) reciprocity fairness (ibid.). He argues that the moral basis for equality fairness is the recognition that people are fundamentally the same in important respects (ibid., 288), while the moral basis for reciprocity-fairness is an understanding of justice as reciprocity (ibid., 294f). Under equality-fairness he subsumes non-discrimination fairness, distributional fairness, and golden rule fairness (ibid., 286), under reciprocity fairness he subsumes positive reciprocity fairness, negative reciprocity fairness, privacy fairness, and maximum benefit fairness.

Although I discuss all the principles he mentions as well, my way of structuring is different in that I try to distinguish between issues of general morality, justice, and fairness. I assume what he calls *golden rule fairness* to be about reciprocity, which I see, together with the concept of equality, as moral bases of justice, fairness, and general ethics. Further, we have discussed issues of *distributional fairness* in a broader perspective under the heading of distributional justice to embed them in the relevant context, and part of what Suranovic calls *positive reciprocity fairness* under the heading of commutative justice. What he calls *privacy fairness* is basically about self-determination, which I don't take to be an issue of fairness proper, but which I will consider in chapter 5.2. What Suranovic calls *maximum benefit fairness* will be discussed in chapter 5.2.1 with respect to welfare justifications of free trade. What he calls *non-discrimination fairness* will be discussed under the heading of several fairness standards in the following.

In what follows, I will focus of what I consider to be the most common proposals for specific moral fairness standards. There seem to be mainly seven conceptions of what exactly specific moral fairness means in the literature on the topic.⁴¹ They are the following:

- a) Fairness as respect for persons
- b) Fairness as Impartiality
- c) Fairness as Treating Equal Cases Equally, and Similar Cases Similarly
- d) Fairness as compliance with rules
- e) Fairness as fidelity to the aims of social practices
- f) Fairness as proportional fulfillment of stringent claims
- g) Fairness as sharing burdens and benefits equally or proportionally
- h) Fairness as not disadvantaging and taking advantage of others

⁴¹ These are similar to the fairness standards discussed by Carr (2000).

In the following I will present these different fairness-standards, their grounds, implications and problems, and their relevance and plausibility for the topic of “fair trade”. These reflections will serve as a conceptual basis for our analysis of claims of fair trade proper in Part II.

4.1 Fairness as Respect for Persons

One quite common conception of fairness understands it as involving *treating persons with adequate concern and respect*. More formally speaking, a necessary condition for an action or practice to be fair is that it treats persons with adequate concern and respect.

Since fairness in this sense is sometimes used as a technical term in deontic moral theories, Carr calls this understanding of fairness „Kantian fairness“ (Carr 2000, 11). In deontic moral theories persons are understood as autonomous beings capable of formulating and pursuing their own ends, and as such as having dignity and being of incomparable worth. Fairness understood in the said sense requires us to treat others as autonomous agents by respecting their interests.

The incomparable worth of each individual gives rise to a presumption of equality among them which requires the equal treatment of all persons, unless there are morally justifiable reasons for treating them differently. Arbitrary discriminations between people are contrary to this presumptive equality of individuals and are considered unfair since they fail to show the respect due to others (Wolff 1998, 106).

This understanding of fairness is usually implied when someone says that fairness requires us to *respect the interests of others*. Koslowski (1996) for example argues that fairness always implies a fair equalization of interests (Koslowski 1996, 72). In this sense, it could be claimed that “a trade transaction is unfair because it fails to respect the interests of one trade partner”, or that “the workers are treated unfairly since their interests (regarding pay, safety conditions etc.) are not respected”. In the same vein, we could claim that it is unfair to someone not to pay her a living wage, since this doesn’t respect her interests, which implies that she is not respected as a person.

A corollary of understanding fairness as respect for persons is that it requires treating *all* persons with the very same respect they are due as persons. In this sense one can say that Kantian fairness requires one to treat people *as equals*. This is the sense in which e.g. Dworkin (1985) uses the notion of fairness. It is quite different from the sense of *treating people equally* discussed below which is concerned with a formal equality of treatment (this distinction has been explored by Katzner 1971, cf. Carr 2006, 12).

However, there are two basic problems with understanding specific moral fairness as respect for persons: 1) It is certainly not applicable to a range of contexts where we usually use the notion of fairness. For example, athletic competitions would seem to be always unfair according to the notion of Kantian fairness: trying to win seems to involve arbitrarily privileging one’s own interest in winning above the similar interest of the opponent. To avoid this implausible conclusion, we

would have to take recourse to making amendments with regard to certain contexts, where respect for persons is not *directly* relevant for moral conduct, but rather mediated “through the lens provided by putatively reasonable and conventionally (as well as historically) accepted practices” (Carr 2000, 13). However, in these cases then the context would seem to be paramount with regard to determining the demands of fairness, leaving *respect for persons* with no role to play.

2) But even assuming that at least in *some* contexts the concept of fairness is aptly explicated as respect for persons is *not* convincing from an analytical perspective: used in this sense, “fairness” doesn’t seem to capture a *specific* kind of wrong. Rather it merely reiterates what is owed to others as moral beings *anyway* from within a deontic morality. As a matter of fact, this understanding of fairness doesn’t seem to add anything to our *general* understanding of moral obligations, since the obligations referred to as requirements of fairness are duties owed to others as moral beings *anyway* from within a deontic morality. Accordingly the “fair” and the “right” fall together (cf. Carr 2000, 12f), which would make the concept of fairness analytically redundant.

In our terminology, this understanding of fairness would then fall under the heading of the *general fairness* concept, that is, the general deontic understanding of moral rightness. To avoid confusion, in what follows I will therefore treat this understanding of fairness under the heading of *ethical rightness (or wrongness)*. Accordingly, we will treat a claim that “the workers’ interests are not respected” as a claim about an ethical *wrong*, but not a flaw in terms of specific moral *fairness*.

4.2 Fairness as Impartiality

A widespread and appealing understanding of fairness explicates it as *impartiality*. Impartiality is a procedural fairness standard that rules out all forms of partiality and discrimination that treat some better or worse than others for morally irrelevant reasons. Consider the following examples: *Lottery*: What is necessary for a lottery to be considered fair is that no participator is treated preferentially and all are granted exactly the same chances for winning; *the rule of law*: what is necessary for the rule of law to be considered fair is that laws are applied to everybody in the same way and nobody is treated preferentially; *the awarding of prizes*: all candidates should be treated equally and judged according to the same criteria. Note that all these examples concern institutional settings (in a wide sense of the notion). In such contexts, both the rules of the institutions and the actions of the agents implementing those rules are supposed to be impartial to qualify as fair.

When concerned with individual agents, impartiality is usually seen to be concerned with the *reasons* for certain actions as opposed to the *actions* themselves (cf. e.g. Nagel 1970 und 1986). More concretely, impartiality on this level means to act from *impartial or neutral reasons* that are informed by standards of universality and objectivity. The former, universality, means that an actor would want to allow that everybody acts in this way, the latter, objectivity, that the reason for action is one that everybody could have and according to which everybody could act (Nagel 1970, 90-95). In other words, *impartial* reasons are blind for personal preferences and must accordingly be

distinguished from *self-regarding* or *egoistic-partial reasons*, the two kinds of reasons being mutually exclusive (Carr 2000, 17).

The understanding of fairness as impartiality is on display in Rawls's famous notion of *justice as fairness*. As we saw earlier, his *Theory of Justice* (1971) seeks to identify principles of justice for the basic structure of society in an impartial, i.e. fair, way. It does so by devising the setting in which the basic institutional structure is determined as a hypothetical situation, the *original position*, which makes partiality in the determination of what is to count as the principles of justice impossible. We recall that this is reached by imagining the representatives who decide on the principles of justice behind a *veil of ignorance*, which obscures to them the knowledge of their social belonging and thereby makes it impossible for them to be partial in their own favor when deciding on the principles of justice. The latter will thus be impartial, or in Rawls terminology, fair.

I take it that impartiality is a plausible fairness standard for institutional contexts. However, the explication of fairness as impartiality does not work for the perspective of *participants* in social practices. Actually, in many contexts where fairness is relevant it is very natural and uncontroversial for actors to be partial, especially in favor of themselves. Examples are again competitions, where wanting to win is certainly not unfair.

As we said before, in institutional contexts fairness can often be plausibly explicated as impartiality: with regard to the general rules and workings of institutions, the actions of agents in charge of implementing institutional rules, and the actions of agents in their function as certain professionals. Accordingly, in the context of global trade, fairness as impartiality is presumably relevant with regard to the rules and workings of the WTO (see chapter 5.1), and possibly with regard to the trade policies of states (see chapter 6).

Coming back to our original formulation, note that we said that fairness as impartiality rules out all forms of partiality and discrimination that treat some better or worse than others *for morally irrelevant reasons*. And indeed, it is often also claimed that, as a matter of fairness, the rules of institutions and the actions of agents should distinguish between actors in situations that are different in morally relevant ways. This concern for differentiation as a necessary aspect of fairness is captured by what I will call the concept of *qualified impartiality* (see chapter 4.8). At first sight, this might be captured in the next understanding of fairness I will discuss.

4.3 Fairness as Treating Equal Cases Equally, and Similar Cases Similarly

According to George Klosko, the “general idea of fairness” is that “similar individuals should be treated similarly” (Klosko 1992, 34). Put more generally, this view can be expressed as the principle *Treat equal cases equally, and unequal cases unequally*. Carr calls this the *Equal Treatment Principle* (ETP) (Carr 1981, 211). Fairness in this understanding is accordingly thought to require the

equal treatment of equal cases, and a different treatment of different cases in proportion to the nature of the difference. With regard to the context of global trade, this principle resounds in the claim that developing countries should be treated differently in trade agreements than industrialized countries (see chapter 5.2.3).

This understanding of fairness can be expressed as demanding a formal equality of treatment for all parties, and as such approximates the notion of *formal justice*. Formal justice is usually conceptualized together with its counterpart *material justice*: whereas the latter establishes “the rightness or justness of a certain treatment for a given subject”, usually on the basis of claim considerations, the former “*generalizes* the requirements of the material element for all relevantly similar cases” (Carr 1981, 212, my emphasis. Cf. e.g. Hart 1961, 155-161; Perelman 1967). ETP or formal justice is thus “substantively empty and formally neutral between subjects. It does not contain or specify any substantive grounds for the determination of relevant equalities or inequalities; nor does it presume any basic equality between subjects prior to the establishment of such grounds” (Carr 1981, 212).

But *why* should one treat people according to this formal, proportional equality of treatment? Or in other words, where does the normative force of fairness come from according to this understanding?

Aristotle supposed that equal cases should be treated equally (and different cases differently in proportion to the nature of the difference) *because logical consistency or rationality demands it*. However, logical consistency per se is hardly a virtue in moral matters: After having treated some person horribly, consistency concerning equal treatment would require us to treat everybody in a similar situation equally horribly (Frankena 1962, 9-13; Carr 1981, 212). To claim that this is what fairness demands is not plausible in light of the understanding of fairness as a thick ethical concept.

Even with regard solely to good treatment, *equal* treatment seems not generally warranted, as becomes evident when considering supererogatory moral acts. If fairness would require equal treatment, performing one supererogatory act – e.g. giving money to a beggar on the street – would require us to act equally in every comparable situation – e.g. by giving money to all the beggars we encounter. This however again seems to contrast with our intuitions concerning the demands of fairness.

What is primarily relevant concerning how we should treat others then seems not to be logical consistency but *moral propriety*: “If we have moral reasons for treating someone in a particular way, these reasons will apply equally to all similar cases. But the reasons in question, and not the fact of logical consistency, supply the normative grounds that dictate what we ought to do” (Carr 2000, 31). Accordingly, the equal treatment of equal cases “is a consequence of acting upon general moral reasons of following acceptable moral rules, and we get things backwards if we suppose that it is itself a moral reason for treating others in a particular way (Carr 2000, 32; cf. Hart

1961, 156; Perelman 1963, 41; Rawls 1971, 58; Gerwirth 1978, 161f).

It seems then that the notion of formal equality of treatment and consistency is a consequence – not a condition – of morally proper conduct. Consequently, it cannot explain the normative force of fairness claims, nor does it seem to be convincing as an explication of the concept of fairness.

If we want to make sense of the above idea, we have to understand it as stating that *strict* equality of treatment might not be morally right if there are weighty moral reasons for treating some cases differently. To understand this as a demand of *fairness* however would require basing the claim on another fairness standard – presumably *not disadvantaging others*, or possibly *equality of opportunity*.

4.4 Fairness as Compliance with Rules

Another common view has it that fairness amounts to complying with the rules that govern certain activities. There is a simple reason that seems to suggest this view: breaking the rules to one's own advantage is cheating and a clear intuitive case of unfairness.

However, understanding fairness as compliance with rules is faced with grave problems. For one, rules and procedures are *themselves* subject to fairness concerns – accordingly they cannot be seen as the (sole) normative source of fairness considerations. Second (and relatedly), following rules can sometimes result in unfairness – namely if the rules themselves are unfair. If, for example, I follow a rule that allows women to use a dictionary in a language exam while it prohibits men from doing so, my using a dictionary doesn't seem fair even if I am not thereby breaking the rules. Further, fairness seems to be relevant in social activities that are not governed by explicit rules, such as children using the swing on a playground – although there is no explicit rule stating how that should happen, we would consider it unfair if a few kids claimed the swing for themselves, keeping the others from using it. It seems then that understanding fairness as compliance with *explicit* rules does not capture the core of the concept of fairness.

I conclude that explicating fairness as compliance with rules is not plausible, and I will therefore not accept it as an appropriate fairness standard in our discussion in Part II. However, there is a related suggestion that might be more promising.

4.5 Fairness as Fidelity to the Aims of Social Practice

The position that explicates fairness as fidelity to the aims or guiding principles of social practices can be illustrated by coming back to the popular distinction between procedural and background fairness and Brian Barry's comments on the topic (see 3.5). As we saw there, Barry claimed that „procedural fairness rules out one boxer having a piece of lead inside his gloves; but background

fairness would also rule out any undue disparity in the weight of the boxers; similarly background fairness would rule out sailing boats or cars of different sizes being raced against one another unless suitably handicapped” (Barry 1965, 98-99). Thus, the rules must be in accordance with background fairness to qualify as fair. But what are the appropriate criteria for background fairness?

Barry goes on to argue: “The criteria of background fairness... vary according to the ‘right result’. If all that is being tested is the ability to knock out an opponent, there is no need for any limits on the disparity of size between boxers; but if the boxing match is supposed to be a test of skill, ‘background fairness’ must be brought in to specify the maximum disparity beyond which skill is secondary in determining the result to brute force” (Barry 1965, 103).

Carr argues that this is actually a way of saying that the criteria for background fairness are dependent on the particular activity *itself*, and this is the perspective on fairness he himself proposes: “So then, the fairness of the prescriptive rules that regulate and govern some event or practice apparently depends upon the way these rules facilitate the spirit, ideals, purpose, or point that underlies and inspires the event itself; they rely, that is, on the way these rules promote an end, or telos, of the practice they govern” (Carr 2000, 47). Accordingly, “fairness is more profitably understood in terms of fidelity to the telos, objective, or ideals – to the pursuit of the ‘right result’ – of some social practice than in terms of adherence to rule” (ibid., 48).

In Carr’s sense, fairness “reminds us that even in contested practices we are, and should therefore consider ourselves, fellow participants in a common enterprise first and competitors second. Fairness, then, calls us to our responsibilities to specific others, to our fellow co-operators, and emphasizes our specific attachments and identifications with particular others, regardless of whatever else might separate us” (Carr 2000, 62). And further: “Participants in contested practices ... have divided concerns. On the one hand, they have a personal interest in winning the competition, promoting their own well-being, and/or reaping the rewards available. But as fellow cooperators⁴² in a social practice, they must also accept and adhere to the purpose and ideals of the practice, even though this will almost surely mean putting aside their personal interests on occasion.” (ibid., 61).

As a model case of unfairness, cheating “is an instance of putting one’s personal interests above one’s responsibilities as a fellow cooperator, and this is the sort of thing that violates our sense of fairness. Conversely, a person plays or participates fairly in some purposive social practice if she remains steadfast to the telos of the practice and honors her commitments to her fellow cooperators” (ibid., 62). In other words again, “... the type of defection from the practice associated with unfairness will ... frustrate efforts to achieve a telos of the practice and thus constitute a type of betrayal” (ibid., 63).

According to this perspective, the distinction between procedural and background fairness fades away, since both can be understood as being about fidelity to the goals of a social practice:

⁴² Note that the term “cooperator” here is again used in a very loose sense.

actions, rules, conditions etc. are fair when they are conducive to the purpose of the social practice in question and unfair when they are against the purpose of the practice.

A similar understanding of fairness shines through in some places in Rawls' writing too, such as in the following passage: "Usually acting unfairly is not so much the breaking of any particular rule, even if the infraction is difficult to detect (cheating), but of taking advantage of loopholes or ambiguities in rules, availing oneself of unexpected or special circumstances which make it impossible to enforce them, insisting that rules be enforced to one's advantage when they should be suspended, and more generally, acting contrary to the intention of the practice" (Rawls 1958, 180). Aaron James' theory of fairness in trade is to some extent also based on a similar account (see chapter 5.2.5).

To illustrate the relation between fairness and the goals of purposive associative practices, consider the practice of sporting competitions: their aim is, quite uncontroversially, to identify the most skilled athletes. If someone tries to gain an advantage that goes against this aim, e.g. by fouling when the referee is not watching, this is thus to be considered unfair. If someone acts in accordance with this aim, possibly even above what the official rules require, it is to be considered fair. For an example of the latter, consider the example of a bike race where a mass-crash involving the whole leading group happens. Now imagine that the following group slows down to let the victims of the mass-crash catch up. We would think, or so I take it, that this is an especially fair act. Carr's perspective on fairness can explain why: it promotes the goal of the practice of sporting competitions, namely to determine the most skilled athletes.

The same applies on the level of competition rules: to be fair they must be such as to favor the aim of identifying the most skilled athletes. Another way of expressing this for cases of the distribution of burdens and benefits is that the relevant claim bases for a fair distribution depend on the social practice at hand (more on this below).

Another example is queuing. Here the aim/rationale of the social practice presumably is to coordinate the waiting process on the claim base of order of arrival. If somebody is overtaken by someone who came later, he is unfairly disadvantaged.

On this understanding of fairness, determining what the demands of fairness are in the context of a certain associative practice requires reflection on what should be seen as its aims. This is of course not an unproblematic matter: social practices don't come with a tag on them which identifies their goals – rather they have evolved over time, their social goal being inherent in them. It is thus undoubtedly controversial what should be seen as the purpose of certain social practices (cf. James 2009). Above that, one can of course question the fairness and legitimacy of certain existing social practices and their goals. Carr is aware of that and suggests that their legitimacy can be tested by checking if they are in agreement with the ideals of social justice of the society where they are situated. This amounts to a second order fairness assessment: the fairness of actions is judged

with regard to their being in accordance with the aims or ideals of the social practices in which they are situated, and the fairness of those practices in turn is judged with regard to their being in accordance with the ideals of social justice of the society as a whole. Carr stops at this level (obviously because he subscribes to a communitarian position).

In general, I take Carr's proposal to be interesting and plausible in many respects. However, it is not exhaustive of the moral content of the concept of fairness. First, I first take it to be implausible to assess the rules or aims of particular social practices with regard to some community-specific ideal of social justice. Rather, besides being related to particular social practices, I take it that fairness is based on standards of general morality. As such, the equality of all people is implied in the concept of fairness. In this sense, I take it that we must broaden this notion of fairness to make reference to people's basic equality.

Second, I don't see any convincing reason that would confine the relevance of fairness considerations in his sense to particular societies – after all, if fairness is about what we owe to our fellow participators in purposive social practices, why should the fact that a certain practice transcends state borders annul this normative relation? Rather, it seems to be against the very spirit of Carr's own understanding of the nature of fairness to claim that in the case of *international* practices fairness concerns are simply irrelevant.

I will take up the plausible aspects of Carr's explication of fairness in my own proposal of how fairness should be understood in chapter 4.9.

4.6. Fairness as Proportional Fulfillment of Stringent claims

A prominent explication of fairness was proposed by John Broome (1999, 1994, 1990-91). He understands fairness in the sense of the proportional fulfillment of stringent claims in the context of the distribution of goods (1990, 95). In the case of equal claims, fairness requires equal treatment. In general, fairness requires that "claims should be satisfied in proportion to their strength" (ibid.). It accordingly concerns the *relative* satisfaction of claims: "The heart of my suggestion is that fairness is concerned only with how well each person's claim is satisfied compared with how well other people's are satisfied" (ibid.).

Broome distinguishes fairness-reasons from two other classes of reasons with regard to their respective claim bases, namely *benefit*, which can be maximized (teleology and particularly utilitarianism), and absolute *side-constraints* (1990-91). Whereas justice in Broome's sense is concerned with all kinds claims, fairness is only concerned with the sub-category of fairness claims (ibid., 96). Broome does not offer a complete theory or list of the bases of fairness claims but leaves room for different claim bases on purpose: 'In different circumstances claims will have different sources. Sometimes they may arise from the candidates' needs, from their general rights such as property rights or a right to life, from a debt of gratitude, or from something else.' (Broome 1984, 44). Elsewhere he

suggests that desert, need, and contracts might be among the relevant claim bases (1990-91, 93).

According to Broome's conception of fairness, if someone owes somebody 100 units of corn and another person 200 units on the base of contracts, but doesn't have enough units of corn to fully fulfill both claims, fairness requires that he fulfils each in proportion – that is, the first person has to get the double amount relative to the second person.

Broome argues for his theory among others on the grounds that it explains best why lotteries are a fair means to distribute indivisible goods to which several people have conflicting claims. And indeed, I take it that his theory of fairness is plausible for such distributions, and generally also for situations where divisible goods are to be distributed.

However, there are several problems with regard to Broome's theory of fairness. First and foremost, as far as I can see, it only applies to fairness questions with regard to distributions. With regard to trade, it accordingly only applies to its outcome dimension, whereas it doesn't say anything about the structural and the procedural dimension. Especially the latter is definitely central to most understandings of fairness.

With regard to distributions, second, the biggest problem with the theory in my view is that it rests unclear how we are to determine the relevant claim bases in particular situations. And third, it also remains unclear how we are to compare claims that arise on different bases. For this it seems we would need another reference point from outside the theory.⁴³

As we saw before, there are other fairness explications that might offer a solution with regard to those problems. As such, we could try to specify the relevant claim bases by reference to the aims of the particular practice at hand.

4.7 Fairness as Sharing Burdens and Benefits Proportionally

As was mentioned before, in cases of cooperation, fairness is often thought to require that people get a proportional share from goods that they contribute to producing, and that they take on a proportional share of the costs or burdens when consuming cooperatively produced goods (cf. e.g. Lyons 1965). This is an outcome oriented fairness standard since it concerns a distribution.

In some cases of cooperation (e.g. cooperation in the context of whole societies), the participants in the practice might have the same presumptive claim to shares of the goods their participation helps to create (according to the practice's generally understood purpose), and accordingly not distributing the shares equally would arbitrarily discriminate against those who receive lesser shares, unless special reasons can be given why an unequal distribution is acceptable to all.⁴⁴

⁴³ There are other criticisms of the theory as well, such as in Hooker 2005, where it is argued that Broome's theory is not convincing in situations where claims are very different in weight. cf. Hooker 2005.

⁴⁴ While non-participants would not have a claim to a share of the cooperatively produced goods on the basis of their contribution, they could still raise other potentially reasonable objections, for instance, against harm done to

One of the most famous principles with regard to the fairness standard of distributing burdens and benefits proportionally in cases of cooperation is the so-called “principle of fairness”. It postulates a normative relation between the goods produced in cooperative arrangements and the responsibility of those who profit from them to contribute to them. The according fairness principle is importantly directed against *free-riding* with regard to non-excludable goods, i.e. goods that, once existent, benefit all with no possibility to exclude some from the benefits (cf. Rawls 1971; Carr 2000, 26). A well-known example to illustrate this is public transport. Public transport is a public good since, once operating, everybody can use it and profit from it. Now, the principle of fairness demands that those who benefit from the public good by using it also contribute to its costs, in this case by buying a ticket. Just benefitting from public transport without contributing to its costs would be free-riding on the efforts or costs of others, which would imply an unproportional distribution of burdens and benefits. According to the “principle of fairness” this would thus have to be considered unfair. Another example might be the public good of intact environmental resources, such as e.g. a clean river. When a group of cloth manufacturing firms that operate in the area refrain from leading their wastewater into the river and incur costs for disposing of it in an environmental friendly way, but one firm drains it into the river (which doesn’t reach the critical amount of pollution necessary for the river to be damaged in a substantive way), the latter firm can be said to be free-riding on the efforts of the others.

John Rawls popularized the principle of fairness (which he adapted from Broad (1916, 388) and Hart (1955, 185) and gave it its probably most famous expression: „The main idea“ behind the principle of fairness, he writes, “is that when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefitted from their submission” (Rawls 1971, 112, see also Rawls 1958, 179). And: „We are not to gain from the cooperative labors of others without doing our fair share“ (Rawls 1971, 112).

More recently, Philipp Van Parijs suggested a “principle of fair cooperation” along the lines of the principle of fairness. It centers on the idea of sharing burdens and benefits proportionally in cooperation: for a cooperation to be fair, the ratio of benefits to costs of one party should equal the ratio of benefits to costs of the other parties (Van Parijs 2011). Van Parijs framed the principle in the context of linguistic justice with regard to the costs and benefits of a lingua franca, but it is basically thought to apply to any kind of cooperation.

Aaron James holds a position on fair global trade which is based on a similar understanding when he argues for establishing a fair distribution of burdens and benefits of global trade among the countries involved (see 5.2.5).

The claim that there is a normative relation between the goods produced in a cooperative endeavor and the responsibility of those who profit from them to equally contribute to them (if they can) seems intuitively very appealing. If one accepts this, the question then is of course *where exactly* the principle applies. In other words, what is needed for something to count as a cooperation that triggers the principle of proportionality of burdens and benefits? We will look at this question in chapter 7.3.

4.8 Fairness as Not Taking Advantage of Someone or Something, or Not Disadvantaging Others

The last way to understand the specific moral fairness concept that I want to discuss is fairness as *not taking advantage of someone or something, or as not disadvantaging others*.

In everyday life, people often complain that they have been treated unfairly when they have been taken advantage of by others. In this sense, fairness is often used in the sense of “not taking advantage of people” – even if one could. This seems to be an attractive position as to the *specific* content of the concept of fairness, since in real live situations “Considerations of fairness involve a concern for relative advantages and disadvantages which is foreign to the concerns of justice” (Carr 1981, 214f).

But should we understand “taking advantage of someone”? Gauthier proposed that taking advantage of someone means to improve one’s situation through an interaction that worsens the situation of another (Gauthier 1986, 205). But this account doesn’t seem plausible in general, since there are compelling counterexamples to seeing this as generally unfair. One such example is direct wagers: the party that wins the wager certainly improves his situation through an interaction that worsens the situation of the party that loses the wager – however, we wouldn’t say that the winner acted unfairly.

Another way of understanding advantage taking relates it to taking advantage of a certain *weakness* of another person, instead of the person herself. Accordingly it has the form of taking advantage of *something* (Carr 2000, 13f). This weakness can be a “weakness” of the person herself (like, someone’s having low self-esteem, being bad at mathematics, etc.), or due to certain background conditions (like someone’s being in a desperate situation). Consciously using this weakness or weak position for one’s own advantage, we could suspect, is unfair.

But in many cases it seems perfectly acceptable to take advantage of another’s weakness. For example, in a tennis match it is not considered unfair to take advantage of the opponent’s weak backhand, or in economic competition for a firm to take advantage of its competitors weaker technology. Accordingly, we would need an additional criterion for determining *what kinds* of taking advantage are unfair.

Before exploring this, let us consider if it might be more straightforward to explicate

unfairness as the terminologically related behavior of *disadvantaging* someone. Disadvantaging someone means something along the lines of *impairing the relative persons in the reaching of their goals*, often (but not necessarily) in the sense of *comparative disadvantaging* which implies that somebody else gains as a consequence of the disadvantaging (cf. Carr 2000, 14). This can happen in the form of taking advantage of someone or something in the sense stated above (for example, again, the opponent's weak backhand in a tennis match), but it can also happen in ways that don't imply taking advantage of something, e.g. by cheating in economic exchanges or treating applicants for a job in a biased way.

In any case, many examples show that disadvantaging someone is not *necessarily* unfair: disadvantaging an opponent in a tennis match by taking advantage of his weak backhand is again a case in point, or disadvantaging a competitor on the market by establishing a business the comparative success of which drives him eventually out of the market. Again then, we would need a criterion to distinguish the unfair cases of disadvantaging from the unproblematic ones.

However, many cases of taking advantage of something and of disadvantaging are indeed among the clearest intuitive instances of unfair behavior. Examples are cheating in contexts such as competitions and games, or comparative advantaging of some in the awarding of prizes, offices etc. This is not surprising since, as we said at the outset, fairness concerns arise in contested contexts where comparative gains are sought at the expense of others. "Contested contexts invariably involve comparative advantaging and disadvantaging; that is, they involve making discriminations that may benefit some and that risk either worsening the situation of others or leaving their situation unchanged" (Carr 2000, 14).

So the question we need to ask is *what exactly* makes certain forms of taking advantage of something or disadvantaging unfair.

A promising candidate for such a criterion for deciding between fair and unfair advantage taking and disadvantaging could be *consent*: one could suspect that non- consensual disadvantaging implies unfairness, whereas consensual disadvantaging doesn't. Participating in certain activities such as games, sporting competitions or wagers, it could be argued, implies consenting to the rules that govern these activities, which in turn specify that certain forms of disadvantaging are allowed (e.g. taking advantage of a weak backhand), whereas others are forbidden (e.g. cheating). Disadvantaging consistent with the rules would accordingly constitute consensual (and therefore fair) disadvantaging, whereas disadvantaging against the rules would constitute non-consensual (and therefore unfair) disadvantaging (Carr 2000, 15).

But upon a closer look we find that in the connection just depicted the crucial point seems not to be the consent of people. In many contexts where fairness is relevant, such as games, competitions, queuing, etc. the *partaking in the activity in itself* implies accepting the rules and guiding principles that govern the activity, which in turn form the reasonable expectations of the participants concerning the behavior of other participants. It is then not disadvantaging others in the

absence of consent but rather *disadvantaging others by acting against the rules or guiding principles of the relevant practice* that constitutes the unfairness.

However, there is more. Above that, it seems unfair to take advantage of specific situations, namely those where the other person is *disadvantaged already*. For example, if someone has no bargaining power in a negotiation because he has no reasonable other options than accepting whatever outcome the “negotiation” yields, it seems unfair to take advantage of this situation to get a maximal benefit oneself. Goodin argues along these lines when he claims that: “The generic unfairness (...) lies (...) in playing for advantage in situations where it is inappropriate to do so” (Goodin 1987, 184). Goodin suggests four different situations where it seems inappropriate to seize strategic advantages (Goodin 1987, 185f)⁴⁵:

1. Against players who themselves have renounced to do so.
2. Against players who are unfit/unable to play.
3. Against far weaker players.
4. If one's profit would result from another's grave misfortune.

Like my example above, Goodin's examples suggest that in some cases there is a connection of the unfairness to the relation between the background, procedural and the outcome dimension of interactions. In all the examples, the background conditions of the interaction are such that one party is severely disadvantaged compared to the other already *before* the interaction, in the sense of the parties having highly unequal opportunities in the interaction itself. Taking advantage of this background disadvantage seems clearly unfair.

4.9 Fairness Revisited

Let me bring together the results of our reflections on fairness. I propose the following understanding of fairness: Fairness can be explicated as not disadvantaging any party in an associative practice, as measured against the rationale of the practice,⁴⁶ and the equality-based ideal that all parties should be able to participate in the practice on equal terms. This sounds complicated, but is actually just another way of expressing what is often called *qualified impartiality*, applied to particular contexts, and formulated in a way that makes it applicable not only to institutional contexts, but also to the perspective of participants in the practices. Understood in this sense, fairness is sensitive to disadvantages of some parties in the background conditions of the practice and aims at correcting them so as to enable their fair participation in the practice.

⁴⁵ The list is not necessarily thought to be exhaustive.

⁴⁶ That is, fairness prohibits disadvantaging someone based on bases *other* than the ones that are tied to the rationale of the practice.

To identify the rationale or “aim” of a particular practice, we use a morally informed “constructive interpretation” of the aims of the social practice in question.⁴⁷ In doing this, we make as uncontroversial assumptions as possible. In this sense, for the practice of trade I assume “mutual gain” or “mutual benefit” as the aim of the practice (more on this in Part II).

Fairness in this understanding then is primarily a procedural standard, the requirements of which vary according to the particular context, but are always measured against an assumption of basic equality among the parties.

Understood in this sense, fairness requires more than just the fulfillment of general negative duties. But where do the additional duties come from?

I propose to conceive fairness duties as duties of special relations. We recall that fairness considerations are relevant in situations where individuals are connected to each other as co-participants in purposive social practices, and that what they demand is owed to the other participants in the practice. In this sense, participation in purposive associative practices should be seen as generating a special relation among the participants, which in turn generates the specified fairness duty.

Does this apply to the practice of trade? As I said, I consider “mutual benefit” to be the aim of the practice of trade. So let me consider this question by discussing the general case of mutually beneficial interactions between actors, which is often assumed to generate certain duties: the so-called Interaction-Principle.⁴⁸

The Interaction-Principle (IP) holds that “one has special responsibilities to those with whom one interacts beneficially that one would not have if one had chosen not to interact with them” (Wertheimer, cited in: Zwolinski 2007, 708). In other words, IP claims that interacting beneficially with others puts one in a *special relation* to them that generates *special obligations* or *associative duties* (Scheffler 2001, 49) towards them.

Take Wertheimer’s example to illustrate this: “*Lawn Mowing*. A proposes to hire B to mow his lawn for a fee (X). B agrees to mow A’s lawn for X. Call (X) ‘the contractual level’ of benefits” (Wertheimer 2011, 256). Clearly, A has no obligation to hire B or anybody to mow his lawn – he could just do it by himself. But IP holds that *if* he hires B (or somebody else) to mow his lawn and thereby benefits from B’s labor, there is a minimum level of benefits that B should receive – namely a *fair* one. This fair level of benefits is not defined by the contract which A and B negotiated, but is somehow defined independently.⁴⁹

The argument behind this can be spelled out as follows: Interacting beneficially with others puts one in a *special relation* to them that generates *special obligations* or *associative duties* (Scheffler

⁴⁷ Cf. James 2005a, 33.

⁴⁸ However, note that IP is controversial. For my argument this does not constitute a problem though. See below, and chapter 7.

⁴⁹ What this is supposed to mean is of course not trivial at all. The question is discussed in chapter 7.

2001, 49) towards them. In the case of beneficial transactions, these special obligations demand that we reciprocate the benefits received, or, in other words, we make sure that the benefactor is sufficiently benefitted in the interaction or cooperation himself.

In this sense, we could say that IP holds that benefitting from an interaction generates a prospective responsibility⁵⁰ for making sure that the benefactor is sufficiently benefitted in the interaction scheme as well. Combined with the idea of proportionality as part of the idea of justice, “sufficiently” spells out as “proportionally”: the Interaction-Principle then claims that in interactions that are to ones benefit, one has a prospective responsibility to make sure that the benefactor is *proportionately benefitted* as well. In other words: the Interaction-Principle demands a fair or just outcome of transactions in the context of economic exchanges.

The Interaction-Principle seems to rest on (or to be an expression of) the norm of positive reciprocity, which holds essentially that someone who benefits from the beneficial actions of others is morally required to *reciprocate* by equally beneficial actions. The (complicated!) question what exactly this might amount to will be discussed in chapter 7.

In my view, the mutually beneficial interactions of the Interaction-Principle should be understood as particular cases of associative practices which generate duties of fairness. I do not claim, however, that IP is correct in claiming that it triggers an *outcome* related fairness assessment. Rather, the discussion of IP should have given us a reason to consider trade as a mutually beneficial interaction as an associative practice that triggers the *less demanding* procedural duty of fairness I have specified above. However, this might spell out in the sense of the Interaction-Principle, since above being an associative practice, trade is a mutually beneficial interaction as well (more on this in chapter 7.).

Conclusions on Part I

Let me revisit the course of our analysis so far. At the outset we specified the general question of our analysis as being: what is *fair trade*?

We then had a first look at the term “trade” which in a primary sense refers to economic exchanges between trading entities (usually individuals or companies). In a secondary sense it refers to trade between states, meaning that trade takes place between trading entities from different countries, its background conditions being set by trade policies of and trade agreements between the respective states. These background conditions of trade, we said, are referred to as “the trading system”, which is sometimes also shortened to “trade”.

Next, we examined the term “fair”, distinguishing different general meanings of the term: a non-moral concept (not relevant for our topic), a *general* moral concept (fair=morally right), and a *specific* moral concept (fair=absence of a specific moral flaw, similar to *just*). We presented different

⁵⁰ What this means exactly is explained in the next chapter. For now, just read “responsibility”.

views on the relation between justice and fairness: a) that they are the same, b) that justice is about outcomes and fairness about processes, and c) that justice is about encompassing institutions and fairness about particular social practices.

We then turned to reciprocity and proportionality and argued that they are important elements of traditional understandings of justice and also present in certain understanding of fairness in the context of global trade. We shortly considered claim bases and said we would be operating with a pluralist understanding of claim bases. We then examined imperfect duties of benevolence and perfect duties of justice and duties of special relations. We argued that requiring the fulfillment of stringent claims and perfect moral duties can be understood as the demands of general morality, and that we would therefore consider positions on “fair trade” which are based on the fulfillment of general stringent claims as being about *ethical trade*. With regard to *ethical trade*, we want to know what perfect duties of justice there are for which actors in the realm of global trade which need to be fulfilled for trade to count as ethical. We said that these include first, uncontroversial negative duties (i.e. prohibiting the violation of basic rights). Second, they include possibly positive duties of assistance which are, however, controversial and would have to be justified carefully. Third, they include duties of special relations, namely fairness duties. The latter, however, I consider not under ethical trade in general, but under *fair trade* in particular.

Next we considered how different claim bases can be at the base of diverging positions on what morality demands in the context of global trade, and why I consider a pluralistic deontological position on claim bases to be plausible.

We then explored different dimension of justice and their relevance for positions on fair trade. I distinguished between the structural, procedural and outcome dimension of justice and elaborated on their relation. I introduced two forms of outcome justice, namely allocative and cooperative justice, with only the latter being of relevance for questions of fair trade. We then examined equality as a central aspect of justice, fairness and general morality, and the concept of equality of opportunity, which is of high relevance for debates on fair trade. Subsequently we shortly had a look at conceptions of negative and positive equality.

Next, we then turned to distributive justice, considering first different positions in the national realm, and second positions on distributive global justice which can be found in the background on positions on fair trade. We then turned to commutative justice and its idea that in just exchanges equivalents are traded, an idea that is highly relevant for certain positions on fair trade. I discussed the difficulties of subjective value theories in accounting for our moral discomfort with regard to certain exchanges, turned to objective value theories in an attempt to overcome them and showed them running into much worse difficulties, thereby forcing us to abandon them. As a last dimension of justice we considered intergenerational justice, and I argued that its focus on the claims of future generations is an important additional perspective we need to include in any plausible account of ethical trade.

Later we turned to the narrow (specific moral) fairness concept and examined different fairness standards as to their plausibility, range of application, and implications for positions on fair trade. I concluded that respect for persons should be seen as a general ethical standard instead of a specific moral fairness standard, that qualified impartiality is a plausible fairness standard in institutional settings, that treating equal cases equally and different cases differently is not per se a convincing fairness standard, and neither is compliance with rules. I argued that fairness as fidelity to the aims of social practices has quite some plausibility in general but is also confronted with weighty problems, and finally that not taking advantage of certain things is plausible fairness standard if adjusted.

Finally and based on this analysis, I proposed my own understanding of fairness as not disadvantaging any party participating in the associative practice at hand, as measured against the rationale of the institution or practice, and the equality-based ideal that all parties should be able to participate in the practice on equal terms. I said that importantly, understood in this sense, fairness is sensitive to disadvantages of some parties in the background conditions of the practice and aims at correcting them so as to enable their fair participation in the practice. Fairness in this understanding then is primarily a procedural standard, the requirements of which vary according to the particular context, but are always measured against an assumption of basic equality among the parties. I explained the fact that fairness demands more than just the fulfillment of general negative duties by arguing that fairness duties should be conceived as duties of special relations, and illustrated this by discussing the Interaction-Principle. I suggested that trade should be seen as an associative practice and accordingly as triggering the specified fairness standard.

By way of concluding our analysis of central moral concepts concerning debates on fair trade, let us consider what they result in with regard to our understanding of different general concepts of fair trade. In this sense, I suggest we establish an analytical distinction between *ethical trade*, *just trade*, and *fair trade*, in the following way:

1) Ethical trade: Ethical trade refers to the actions of trading actors. The basic condition of *ethical trade* is that trading actors fulfill their perfect moral duties with regard to trade. This means most importantly that they don't violate negative rights in the context of trade, and are not co-responsible for other actors violating negative rights either. The extent of trading actors' duties is defined by the scope of their corresponding responsibility (see chapter 3.4 and 7.4). The counterpart of this is that for trade to qualify as ethical, the stringent trade-related moral claims of the people involved must be fulfilled.

2) Just trade: Just trade refers to trading systems. The conditions of *just trade* are that the background conditions and the distributive outcomes of the trading system are just with regard to the fulfillment of people's stringent moral rights and claims. In this sense, just trade is embedded in the context of whole institutional systems and linked to a conception of distributive social justice.

With regard to global trade, positions on just trade are accordingly related to positions on global justice. Assuming the international context is a context of justice in a minimal sense that respects people's basic moral equality, I take it that for the global background conditions of trade to be considered just, it is at least required that people's basic rights are fulfilled in a sufficientarian sense.

According to our examination of the relation between the three dimensions of justice, if background conditions of trade are just, *pure procedural justice/fairness* in trading interactions is enough for them to qualify as morally legitimate. But if just background conditions are absent, either procedural conditions must be conceived in a more demanding way to ensure people's basic moral equality is respected (which is mainly what I will argue for), or outcomes of trade must be judged in their own right in terms of how they satisfy the parties' substantive claims (which is, however, difficult).

3) Fair trade: The basic condition of *fair trade* with regard to the trading system is that the rules or terms of trade (background fairness) are fair. In my understanding, for them to be *fair* means that no party is disadvantaged with regard to the rationale of the practice, against a presumption of basic equality of the parties, and an ideal of equality of opportunity among them.

With regard to trade among trading actors, the main condition of *fair trade* is a procedural standard, namely that no party is disadvantaged in transactions, with regard to the rationale of the practice, against a presumption of basic equality of the parties, and an ideal of equality of opportunity among them. This takes background conditions into account in the sense of (hypothetically) correcting them so as to enable the equal participation of the disadvantaged parties in trade exchanges. Accordingly, as long as background conditions disadvantage some parties in a process, fairness requires us to adjust the process in a way that makes up for the disadvantage, or to hypothetically "imagine the disadvantage away" when deciding on the outcome. Since just background conditions are not given in the current non-ideal situation, to ensure people's basic moral equality is respected, the conditions of *fair global trade* are more demanding than they would otherwise be. With regard to procedural conditions, fairness in trade requires that no advantage is taken from other's being disadvantaged by the background conditions of the interaction, which implies correcting for the disadvantage in the trade exchanges itself.

In the special case of cooperation, the additional outcome related fairness standard of *sharing burdens and benefits proportionally* applies and has to be fulfilled for the outcomes of the cooperation to qualify as fair. I call this standard "outcome fairness".

The reflections of Part I should have equipped us with a more substantive understanding of the most relevant ethical concepts in the background of debates on "fair trade" and should enable us to see concrete positions on fair trade in their philosophical context. Let us then turn to Part II, where we will examine 10 widespread positions on what constitutes "fair trade" on different levels of conceptualization, and critically analyze their ethical underpinnings.

Part II: The Normative Foundations of Positions on Fair Trade

5. Fair Trade on the Level of the World Trading System

The level of the world trade system is clearly a highly important focus for reflections on fair and just trade. As we said earlier, from the perspective of political philosophy it might in fact look like the *only* level on which one can sensibly discuss the question of fair or just global trade since it concerns the overarching institutional background conditions of global trade.

Since the governance of global trade is crucially determined by the World Trade Organization (WTO) which is the “unique supplier of the global public good of universal rules” (Low 2009, 331) for international trade, the focus in this chapter will be on the global multilateral trade system of the WTO.⁵¹ The positions on “fair trade” which are discussed in chapter 5 accordingly concern, strictly speaking, the fairness of the *world trading system* as constituted by the WTO.

When looking at the fairness of the world trading system in the context of the WTO, it makes sense to distinguish between two dimensions: 1) The institutional *structure and workings* of the World Trade Organization and 2) the *rules* of the world trade system devised by the WTO. In what follows I will give a short overview over each of these dimensions and then introduce the positions on “fair trade” I want to discuss on each of them. Let us start with a).

5.1 The Institutional Structure and Workings of the World Trade Organization

The World Trade Organization, which was formally established in 1995 and is located in Geneva, Switzerland, is the product of international negotiations among countries. It developed out of negotiations under the General Agreement on Tariffs and Trade (GATT) and the 1986-94 international trade negotiations called the “Uruguay Round”. Its main functions consist in being a forum for trade negotiations, administering the WTO trade agreements, monitoring national trade policies, and settling trade disputes. It also offers technical training for developing countries and cooperates with other international organizations. At date the WTO has 164 member states (out of 196 existing countries).

The WTO is by structure and process an institution that works on the principle of self-interested bargaining and negotiation. Its institutional design and its decision making processes are neither democratic nor guided by underlying principles of justice, but rather consist in each party trying to foster its own interests. As a result of its institutional setup, rich countries with high bargaining power have so far clearly dominated the negotiations, while poor countries with little bargaining power have had little influence over them (Steinberg 2002). A factor that reinforces this power asymmetry is a corresponding asymmetry of information among WTO members in favor of the industrialized countries.

Fairness-related criticisms of the WTO accordingly usually contend that, as a result of its

⁵¹ States are also involved in regulating trade among themselves unilaterally, bilaterally and regionally.

institutional structure, the WTO negotiations, which define the rules of global trade, are characterized by power inequalities, and are neither inclusive of all its members nor deliberative in character⁵² (Goff 2011, 6-7).

The situation is similar with regard to the WTO dispute settlement process, one of its crucial enforcement mechanisms and also a major target for criticism for being unfair (see below).

I take it that the claim underlying these criticisms concerning the WTO negotiations and enforcement processes can be expressed in the following claim: Current global trade institutions (i.e. the WTO) are unfair because they determine and enforce the rules of trade through unfair processes, which leads to the trading system as a whole being unfair. The converse claim is accordingly: fair trade institutions (i.e. a fair WTO) determine and enforce the rules of trade through fair processes, and this in turn is a necessary condition for a fair global trading system. This is the first position on fair trade that I want to discuss in the following in relation to the criticism of the WTO.

5.1.1 Position (a) Fair trade is trade the rules of which are determined and enforced by fair processes

The idea of position a) is that a fair world trading system (i.e. a world trading system with fair rules) can only be the outcome of a fair decision making process in the WTO, and a fair enforcement process regarding these rules. Position (a) can be reconstructed in terms of the conditions it specifies for trade to qualify as fair as follows: *trade is fair if its rules are determined and enforced by fair processes*. Trade here is understood in the sense of the global trading system, and the processes concern the WTO negotiations and enforcement processes. The basic normative argument goes as follows:

(P1) If the processes of WTO decision making and rule enforcement are fair, the world trading system is fair.

(P2) The WTO decision making process is unfair

(P3) The WTO rule enforcement process is unfair

(C) The global trading system is unfair

Should (P1) be understood as specifying necessary or sufficient conditions for the trading system to qualify as fair? Regarding the enforcement process, presumably yes. But what about the negotiation process? It would only be a sufficient condition if the case at hand were a case of pure procedural justice (where just outcomes are *determined* through a just process, see chapter 3.6.). But this is not plausible, since apart from being the *outcome* of the WTO negotiations, the rules of the world trading system

⁵² With regard to these and related issues, there is controversy among international legal theorists regarding the question whether the WTO (and other international organizations) either already have, or are in need of, a constitution (Dunoff 2009; Trachtman, 2009). Cf. Goff 2011, 8.

constitute the *background conditions* of global trade, and as such they have to be assessed with regard to their fairness or justice in their own right. Let us therefore assume that with regard to the negotiations, P1 is a necessary but not a sufficient condition for the fairness of the global trading system. We will look at positions that assess the fairness of the global trading system as such in chapter 5.2.

With regard to our analytical questions, note that the subject of the normative assessment here is the WTO as an institution, or, more precisely, its processes. Regarding this subject, the assessment concerns the procedural dimension, and is based on fairness proper. The subject of the position's presumed moral duties to ensure fairness are the member states of the WTO.

Let us look at (P2). Note at the outset that the claim that the WTO decision making processes in the WTO are unfair presupposes that the dealings between its member states are a subject for judgements of fairness or justice *at all*. But this is controversial: a position which puts strong emphasis on state sovereignty might not consider the fact that the WTO is based solely on self-interested bargaining as problematic. This view, which asserts the right of states to mind their own business, reflects the current realities of the international state system, and is highly influential among policy-makers, lawyers, and social scientist (Risse 2007, 360). The respective view of the international order is often called the *Westphalien view*, since it goes back to the historical Westphalien peace system of 1648 which asserted the principle of states' sovereignty from foreign intrusion in Europe. What Risse calls the strong Westphalien view (ibid.) amounts to a so-called *realist* view of international politics, which was famously formulated by Thomas Hobbes. Hobbes argued that, although true principles of justice as a property of the relations among human beings can be discovered by moral reasoning, actual justice can only be achieved under a government with the monopoly on force, i.e. in a sovereign state. Since there is no government on the international level, in this realm separate sovereigns face each other in the pre-institutional *state of nature*, where there are no such things as *just* or *unjust* or *fair* or *unfair* – at least until a contract is signed, in which case justice requires to fulfil its terms. Accordingly, on the international level nation-states representing the interests of their own societies are dealing with each other under no idea of justice (besides the one mentioned), and the fact that negotiations in the WTO are based on self-interested bargaining alone is nothing but normal and normatively unproblematic. International organizations, including the WTO, are not considered as proper entities for being guided by an ideal of justice.

However, most theorists besides the ones taking a realist view on global politics argue in some way or another that issues of fairness or justice *do* arise on the international level. If they do, this presumably applies to the WTO as the institution that sets the rules for global trade. Note that this is far from requiring some sort of global distributive justice⁵³ - it only requires that member states makes decisions by way of fair processes. On the basis of the understanding of fairness developed in Part I, we

⁵³ Though this might be required too – for such positions see the next chapter.

can argue that fairness duties do apply in this context since the negotiations in the WTO – like any other negotiation – are a purposive associative practice. Let us consider the practice of negotiating to examine what fairness demands in the context of negotiations.

Negotiations are joint decision-making processes in which parties, with initially opposing positions and conflicting interests, arrive at mutually beneficial and satisfactory agreements. The method can lend legitimacy to outcomes if they have been agreed upon in a process of deliberation, and can facilitate their implementation (cf. Albin 2001, 1f). Negotiations normally include “dialogue with problem-solving and discussion on merits, as well as bargaining and the exchange of concessions with the use of competitive tactics” (ibid.,1). They usually give the parties considerable control over the process and outcome, since every party can normally exercise leverage based on various sources – at the very least based on their ability to threaten to walk away from the negotiation table. Traditional negotiation analysis distinguishes between integrative and distributive processes (Walton / McKersie 1965, Pruitt 1981). The former refers to “win-win” negotiations in which parties cooperate to identify or create solutions of high joint gains which eliminate the need for costly concessions.

The latter refers to competitive “win-lose” bargaining in which selfish parties seek merely to maximize their own gains. This equals the realist view of international politics, where a party’s readiness to make concessions is based on a calculation of its relative strength vis-à-vis the other parties. If parties act according to the realist view, the outcomes of negotiations will accordingly largely reflect the relative power of the parties, particularly in the case of substantial power asymmetries. “Power” here can be understood in various ways, “ranging from conventional military and economic resources to the possession of skills, access to information and the exercise of leadership. A key element is certainly the value of a party’s best alternative to a negotiated agreement (cf. Fisher/Ury 1981). The higher that value a party’s best alternative to a negotiated agreement the less dependent the party is on reaching an agreement and the more it can afford to concede little, take risks and wait out the other side. It cannot be so abusive as to remove all incentives to negotiate, but may “appease a weaker party by offering some advantage over a continued state of conflict on unequal terms” (Albin 2001, 5). As mentioned, this is considered morally unproblematic from a realist view and from the perspective of theories of justice (based on the former) which understand justice as “mutual advantage” and require only the formal voluntariness of agreements for them to be legitimate (e.g. Gauthier 1986). As we saw in Part I, these theories are difficult to defend against the plausible view that justice entails an elements of normative justifiability on impartial grounds which can elicit substantially voluntary agreement and cooperation.

Let’s apply our understanding of fairness to the practice of negotiations. Fairness in the specified sense requests a negotiation process that does not disadvantage some parties compared to others as measured against the rationale of negotiations, understood presumably as something along the lines of finding solutions of high joint gains among the parties, and the presumption of

equality and equal opportunity of the parties. As we saw, this means that we have to include the structural dimension of the negotiations in the assessment of their procedural fairness.

With this in mind, let us look at how the structural dimension of WTO negotiations is constituted. The structural conditions of negotiations can be understood to comprise the context and forum of the negotiation including the criteria for the determination of participants to the negotiation, the rules and codes of conduct for the negotiations, and the criteria for agenda setting specifying which issues are discussed (cf. Albin 2001, 53). “Most structural elements are determined in earlier preparatory discussions or by extraneous factors, and remain constant once formal talks have begun” (Albin 2001, 26).

In the sense of our understanding of fairness, structural justice in negotiations should honor the claims of actors to *equal chances for participation and success in the finding of joint agreements*. With regard to the criteria for participation it is often argued that it is required that all parties whose legitimate interests are at stake should be allowed to participate in the negotiations (cf. Susskind and Cruikshank 1987). This, however, would possibly suggest that formal participation should be expanded from states alone to other actors such as international organizations, NGO’s, and MNE’s, a suggestion which is hotly debated (cf. Albin 1999). However, it is of course controversial who the legitimate parties are regarding each particular issue. Much would be gained already though if this question was open for debate instead of being predetermined.

With regard to the rules and codes of conduct of the negotiations, they concern among others methods of decision making, the use of deadlines, and procedures for communication. In line with our understanding of fair negotiations, the idea of many critics seems to be that WTO member states should all have equal *weight* in the negotiations. But for parties having equal weight in the strict sense it would be required to move to another form of decision making altogether, namely a highly deliberative, consensual or a democratic process. In practice, democratizing the WTO is currently certainly not a viable option, and neither would it be considered a morally legitimate one from a broadly nationalist standpoint. However, it might be tried to come *closer* to the ideal of an equal say of participants in the WTO negotiations without restructuring the WTO democratically. This might be achieved by favoring deliberative approaches over confrontational ones, since the former mitigate the influence of power inequalities while the latter enhance it. In the terms of negotiation analysis literature, this would amount to favoring integrative negotiation processes above distributive ones.

Regarding agenda setting for negotiations (another area of common criticism with regard to the WTO), a broad background framework is often already given by the norms, principles and objective set out in earlier agreements, such as the norms of reciprocity, fair competition and non-discrimination which were incorporated in the GATT (more on these in chapter 4.2). Nevertheless, agenda setting for particular negotiations, including the order in which issues are discussed and the

linkages between issues, has a large effect on their outcome. Negotiators usually try to get maximum coverage of the issues of most interest for them, and linkages which improve their own basis of bargaining and terms of trade. Linkages can thus be used to improve one side's leverage over the other side. "One party can tie its readiness to move and make a deal on a particular issue to a willingness of the other to concede on another matter added to the agenda. Linkages of issues also suggest that legitimate trade-offs can be made between them" (Albin 2001, 30).

From the perspective of fairness it seems warranted that for each negotiation a sufficiently broad agenda is established "which includes, orders and links issues in a way which takes into account essential interests and concerns of all parties" (ibid., 30).

Let us turn to the procedural fairness dimension of WTO negotiations now. Procedural fairness in negotiations refers to how the parties treat each other in the process of negotiating, the pattern of interaction between them as they attempt to reach an agreement. It includes the use of strategies and tactics by individual actors promoting their interests, of joint problem-solving and concession-making and the specific mechanisms used to arrive at an agreement.

There are two issues that are often discussed in the literature on the topic (Albin 2001, cf. Early/Lind 1987, Lind/Tyler 1988). The first concerns how the parties' inputs are treated ("fair input"), which is highly relevant with regard to the social perception of fairness. From our perspective, fairness as *not disadvantaging* demands that the inputs of all parties be taken up and considered seriously, and none be marginalized.

Second, there are the general main procedural conditions thought to hold for any negotiation. They include abidance to the law and rules of the practice, no deceit, and voluntariness. The first and the third condition, abidance to the law and rules and no deceit certainly apply with regard to WTO negotiations. Nevertheless, there are certain grey areas, such as parties "bluffing" about their interests, alternative solutions, and the costs of making particular concessions. To judge this behavior it is important to consider if this is something all parties do and expect from each other or not, i.e. if it is part of the unwritten rules of the practice. In this sense it can be argued that bluffing is unacceptable unless all parties know and accept that it is part of the game (cf. Lax / Sebenius, 1986).

The condition of voluntariness figures prominently in the debates of the fairness of WTO negotiations. Indeed, as the moral basis of their claims defenders of the WTO often resort to voluntariness. They argue that agreements in the WTO are based on voluntary consent, since developing countries are not forced to sign up to them. Additionally it is sometimes argued that membership in the WTO as a whole is voluntary since countries can withdraw from the WTO, and that the fact that they do not do so expresses their consent. These interpretations of the voluntary consent requirement however are highly questionable from a moral point of view. That someone does not exit from an organization or refuses to sign an agreement obviously only implies that all things considered, he thinks he is better off with the agreement or within the organization than without it. It does *not* necessarily imply that he finds the agreement acceptable or considers it to be just. Countries may

benefit from having the ‚rule of law‘ that the WTO provides for trade between nations but that does not mean that they consent to the particular rules themselves. Accordingly it is highly doubtful that the minimalistic interpretation of the voluntariness condition mentioned above carries enough moral weight to guarantee the moral legitimacy of the outcome (in this case, the agreement).⁵⁴

Moreover, those who put forward this argument fail to note the relevance of group actions. Given that others have agreed to sign it may pay to sign for an individual country as well, „but it still may be true that the developing countries as a whole (or a subgroup of these countries) would have been better off if they, as a group, had not signed. (The prisoner’s dilemma arises not only in the case of prisoners, but also in the case of poor countries engaged in bargaining with the rich.)” (Stiglitz/Charlton 2005, 75).

There is another problem regarding the fulfilment of the voluntariness condition in the WTO negotiations. It is often criticized that the industrialized countries get their way in the WTO bargaining process by withholding their development aid payments unless developing countries accept their demands – which is often seen as a form of coercion. While coercion is clearly forbidden by procedural fairness, it is less clear if the said proceeding amounts to coercion in a morally justified sense.

It seems then that the condition of voluntary consent seems crucial for our assessment of the procedural fairness of WTO negotiations. We will have to leave it at that for now, but we will return to the issue and engage in a thorough examination of the voluntariness condition in chapter 6.4.1.5 b).

Are there additional conditions for fair processes in the WTO negotiations? Let me shortly mention a few. Candidates for such conditions are openness and transparency of the negotiation process (cf. Stiglitz/Charlton 2005, 82). „Transparency is essential because it enables more voices to be heard in the negotiating process and limits abuses by the powerful” (ibid). Additionally, it can be argued that technical assistance should be made available when it is needed. According to Stiglitz/Charlton, both conditions are not met to a satisfying extent in WTO negotiations. We can interpret both of these concerns in the sense of the understanding of fairness we have suggested, since they aim at correcting the power asymmetries or their relevance for the negotiation process.

Finally, let us shortly look at (P3), which concerns the enforcement of the rules of the world trading system, as exemplified by one of its crucial enforcement mechanisms: the dispute settlement process. Roughly sketched, the dispute settlement process works in the following way: A member state of the WTO (the “complainant”) can file a complaint against a fellow member state (the “defendant”) with the *Dispute Settlement Body* for violations of WTO rules, such as e.g. a country's imposition of (illegal) tariffs on the complainant's exports. If the case is ruled in favor of the complainant, this entails a legally binding recommendation for the defendant to change its according policies, and gives the

⁵⁴ I will discuss the voluntariness condition in detail in chapter 7.4.

complainant the right to levy a retaliatory tariff. However, since countries with big economies that can impose costly countervailing measures while countries with small economies cannot, the latter are much less likely to achieve resolution in their favor than the former (cf. Stiglitz/Charlton 2005, 76).⁵⁵

How can we understand the fairness problem here? From the perspective of our suggestion for understanding fairness, we need to ask about the *rationale* of the dispute settlement process. We might argue that this rationale is, in effect, to ensure compliance with the rules of the WTO for all member states. Accordingly for it to be considered fair it should not disadvantage any party as measured against this rationale, a general presumption of equality of the parties, and equal opportunity. In the case at hand, this clearly doesn't seem to be the given. A fair process in this case would require a mechanism that does not disadvantage any party in the pursuit of the aim of promoting general compliance with the rules.

5.2 The Rules of the World Trading System

At the heart of the WTO are contracts or agreements which have been negotiated and signed by most of the world's trading nations. These documents provide the legal rules for international trade, binding the signatory governments to keep their trade policies within the limits specified by the documents.

The WTO system's goals include the securing of the stability, predictability and transparency of the conditions for international trade. But the system's declared main purpose is ensuring free trade.⁵⁶

5.2.1 Position (b) Fair Trade is Free Trade

In debates on "fair trade" we often find the implicit claim that "trade is fair if it is free", sometimes also explicitly in the form: "free trade is fair trade". "Trade" here means the trading system, which the position claims has to be free to be fair, that is, it has to be a free market. The subject of the claim's presumed moral duties to ensure fair trade is accordingly the institutions that set the rules for the trading system, be they national or international, and the moral actors that shape these institutions. The according duties ask of them to set the rules in such a way that they allow and ensure free trade. These points hold for all the positions that will be discussed in chapter 5.2.

On the most general level and put very simply, the argument for the claim that "trade is fair if it is free", goes as follows:

⁵⁵ Christina Davis argues that the WTO dispute settlement process is at least more favorable to developing countries than the dispute settlement processes of bilateral trade agreements (Davis, 2006). See also Hudec, 2002). Cf. Goff 2011, 7.

⁵⁶ http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm.

(P1) Trade is fair if x⁵⁷

(P2) If x then trade is free

(C) Trade is fair if it is free

There are several ethical lines of argument for position b), the three most important ones of which will be examined in the following: the argument from liberty, the argument from desert, and the argument from welfare.⁵⁸ In each line of argument for claim (C), x is different and spells out as either:

- a) it is non-coercive (argument from liberty)
- b) it gives to each what they deserve (argument from desert)
- c) it best improves human well-being (argument from welfare)

Before examining the moral arguments, it is helpful at the outset to distinguish them from *efficiency* arguments, which figure prominently in justifications of the free market. This distinction is rather unproblematic, since it can be shown that the two kinds of arguments can point in opposite directions. It is, for example, possible to consistently argue that the free market is morally so defective that it should be reformed or even abandoned altogether, even if doing so would result in a loss of efficiency. On the other hand it is possible to acknowledge that the free market has certain moral deficiencies, and nevertheless conclude consistently that they are not weighty enough as to require us to forgo its efficiency in favor of a less efficient, but morally preferable system.

However, many defenders of the free market assume or argue that efficiency and morality both *convene* in the assessment that the free market is desirable. In this vein, efficiency and moral arguments can merge, and often do so, into “welfare” arguments for the free market. On the other hand there are moral arguments for the free market based on *liberty* (or liberal moral rights) and some based on *desert* that sometimes appear in debates on “fair trade” too. In the following we will shortly look at liberty-based and desert-based arguments for the free market, and in more detail at the arguments based on welfare since they are by far the most important ones with regard to debates on global “fair trade”.⁵⁹

The classification of positions with regard to the distinction between ethical, just, and fair trade will be mentioned in the discussion of the respective positions, as will their respective focus on either the structural, procedural or the outcome dimension of trade in the sense of the trading system.

⁵⁷ With x being the condition of the particular line of argument; see below.

⁵⁸ The following account of the different lines of argument for the free market is mostly based on Buchanan 1985, O’Neill 1998, and Olsaretti 2004.

⁵⁹ There are also arguments from neutrality, autonomy, epistemic considerations and self-interest for the free market, which I will not pursue further since they seem to be of limited importance in the debates on “fair trade”. For a discussion see O’Neill 1998.

5.2.1.1 The argument from liberty for free trade

The arguments for the free market from liberty are based on a non-instrumental conception of the value of liberty, that is, a conception that values freedom as an end in itself. As Milton Friedman puts it, *“economic freedom, in and of itself, is an extremely important part of total freedom”* (Friedman 1962, 9). While there are several arguments from liberty for the free market, sometimes using different concepts of liberty, their common denominator is that they are based on a *negative* conception of liberty in the spirit of Mills’ “harm principle”.⁶⁰ This principle holds that *“the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others”* (Mill [1859], 2009, 34). In all other cases no coercion is allowed, not even benevolent paternalism. The choices of individuals have to be respected even if they might seem unreasonable or misguided to the observer. This relates back to Nozick’s (1974) libertarian argumentation as presented in chapter 3.6.2.

Why does this speak in favor of free markets? Friedman states several reasons for this, the most important one being a healthy limitation of (market) power resulting from competition in free markets: *“So long as effective freedom of exchange is maintained, the central feature of the market organization of economic activity is that it prevents one person from interfering with another in respect of most of his activities. The consumer is protected from coercion by the seller because of the presence of other sellers with whom he can deal. The seller is protected from coercion by the consumer because of other consumers to whom he can sell. The employee is protected from coercion by the employer because of other employers for whom he can work, and so on. And the market does this impersonally and without centralized authority”*(Friedman 1962, 15).

In this sense, the argument from liberty is an argument against political obstructions of free trade in the sense of voluntary exchanges between individual trading actors because this would mean coercing them.

The position concerns the background conditions of trade and argues that they must be just in the sense of being non-coercive for the trading system to be just. The institutions that set the rules of the trading system have the according duty not to coerce individuals by restricting their trading activities.

Applied to the above claim about “fair trade”, (P1) then spells out as “trade is fair if it is non-coercive”, and the corresponding position “Fair trade is free trade” spells out as “Fair trade is trade that is non-coercive”. In my terminology, this position is a position on *just trade* in the sense of

⁶⁰ It is also possible to argue for a free market on the grounds of a *positive* notion of liberty in the sense of *freedom of choice*. This argument holds that, apart from not coercing people to make a certain choice, free markets guarantee that the goods being produced give the consumers a maximal range of choices that match their preferences. Free markets are accordingly valued because they provide every individual with the freedom to make her own choices out of a variety of options. In addition some instrumental arguments in favor of economic freedom can be brought forward. Milton Friedman for instance believed economic freedom to be a necessary prerequisite of *political freedom* (Friedman 1962, 8 and 10). I will not pursue them further here because of both reasons of scope and because they are not common in debates on fair global trade.

concerning just background institutions of trade. Accordingly the argument actually reads:

(P1) The trading system is just if it is non-coercive

(P2) The trading system is non-coercive if it is free

(C) The trading system is just if it is free

In general, I take it that the argument from liberty is strong. Non-coercion is a basic requirement for institutions, and coercion can only be justified with very strong reasons in particular cases⁶¹ (cf. sections 3.6.-3.7).

There is an important implication of the argument's emphasis on the value of people's freedom and accordingly the voluntariness of economic exchanges: It generates duties not only for institutions but also for individual trading actors to respect the right of other individuals not to be coerced in economic transactions. The duty not to coerce does not only apply to institutions, but is a perfect duty for individuals too. Accordingly, the argument from liberty must be understood as having a corollary argument with regard to economic exchanges between individual trading actors. This argument establishes a procedural criterion, namely non-coercion, as the condition of free (that is, voluntary) trade, and trading actors accordingly have the duty to ensure this is the case. It goes like this:

(P1) Economic exchanges are ethical if they are non-coercive

(P2) If economic exchanges are non-coercive then they are voluntary

(C) Economic exchanges are ethical if they are voluntary

I will discuss this issue how non-coercion and voluntariness are related in detail in chapter 6.4.1.5 where we are concerned with transactions in the supply chains of MNEs. At this point, let me anticipate my suggestion that the said concern is due to the fact that, for trade to qualify as ethical *all* trade-related perfect duties have to be fulfilled – which includes duties of fairness that might go further than mere non-coercion. I will argue that the fairness-explication I elaborated in chapter 4.9 gives us reason to argue that indeed a stronger criterion of voluntariness is needed for the above claim “economic exchanges are ethical if they are voluntary” to be plausible.

For now though, let us turn to the second line of argument for the claim that trade is fair if it is free: The argument from desert.

⁶¹ Such as for example in the case of detaining criminals, or possibly, forcing citizens to pay taxes.

5.2.1.2 The argument from desert for free trade

The argument from desert holds that the free market distributes wealth according to desert and is therefore, according to a definition of justice based on desert, just (cf. Feinberg 1970). The respective position claims that free trade is just in the sense of leading to just (market) outcomes. As such, the position concerns the outcome dimension of trade. It is a position on *just trade*, because it concerns the justice of the distribution resulting from trade. The argument from desert for the free market reads:

(P1) The trading system is just if it gives to each what they deserve

(P2) The trading system gives to each what they deserve if it is free

(C) The trading system is just if it is free

Let us examine the ethical foundations of the argument. The desert-based version of the position “trade is fair (just) if it is free” rests on two main claims: that the principle of desert is a defensible principle of justice (P1), and that the free market distributes according to desert (cf. Olsaretti 2004, 37.)

For reasons of scope I will not discuss (P1) myself, but rather quickly sketch Olsaretti’s analysis. It suggests that a defensible principle of desert that can lend itself to justifying market outcomes as just must meet the following conditions: 1) desert must be non-virtue based; 2) it must be pre-institutional; and 3) it must be independent of other values in defining justice. Additionally, for distributions on the basis of the principle of desert to qualify as just, 4) inequalities in desert may not reflect an unjustified advantage of some, which implies some sort of fair opportunity for all (which, it turns out, means that it must imply that people are *responsible* for being more or less deserving). Finally, 5) everyone must be treated equally relative to their desert.

Olsaretti comes to the conclusion that a defensible notion of desert resulting from these conditions could be construed, namely in the form of responsibility-sensitive or active desert (ibid., 38). Let’s assume for the sake of the argument that she is correct, and turn to (P2), the claim that the free market distributes according to desert.

I agree with Olsaretti that the most promising argument for (P2) holds that the market distributes income (and/or wealth) in proportion to the individual's *productive contribution to society or to the good of others* (accepting only this as a desert base). This argument rests on two assumptions: a) the share of wealth a person obtains in the market system is proportional to her marginal productivity (the additional amount of “output” she produces for each additional amount of “input”); and b) a person's marginal productivity is an accurate measure of her contribution to the good of others. How plausible are these assumptions?

Let’s start with a). The problem with a) is that it overlooks that human beings start their lives as unproductive children, receiving a share of wealth which is not correlated at all with

their contribution to the good of others (cf. Buchanan 1985, 52). This undeserved wealth has a high influence on how somebody fares in the market and generally wealth-wise later on in life. The assumption therefore quickly turns out to be implausible.

Regarding b) on the other hand, people with high marginal productivity (and according high income) don't necessarily contribute much to the well-being of others – think for example of people selling weapons, drugs etc. Above that, the assumption ignores the externalities generated by economic activity, which is not reflected in an individual's marginal productivity. As a consequence, this assumption turns out to be implausible too (cf. Buchanan 1985, 53).⁶²

In sum, (P2) is clearly not plausible. Accordingly, I take it that the argument from desert as a whole is implausible as a moral basis for the claim that “fair trade is free trade”.

Let's now turn to the most important line of argument for the claim that “fair trade is free trade” in current debates: The arguments from welfare.

5.2.1.3 Arguments from welfare for free trade

Welfare arguments are central to the defense of the free market and free trade. The free market, so the basic argument is the economic system that best improves human well-being. This argument runs through economic theory from classical economists such as Adam Smith through to modern neo-classical and Austrian schools (cf. O'Neill 1998, 35).

The basic welfare argument for the free market goes as follows:

(P1) The trading system is ethical if it best improves human well-being⁶³

(P2) The trading system best improves human well-being if it is free

(C) The trading system is ethical if it is free

Regarding the procedural-outcome distinction, the argument claims that a free trading system leads to the best outcome for human well-being, that is, it focuses on the *outcome* dimension of trade. Further, it claims that free trade is morally required because, compared to the alternatives, it has the best consequences for human well-being. As such, it is based on a consequentialist theory of general ethics (cf. chapter 3.2) that considers people's well-being as central to morality. With regard to my terminology, the respective position is accordingly a position on *ethical trade*, and (P1) specifies a necessary and sufficient condition for the trade system to be ethical.

Let us examine the ethical foundations of the argument. The argument from welfare usually takes a utilitarian form.⁶⁴ This is not surprising, since the founding figures of neo-classical economics

⁶² For a discussion of additional arguments leading to the conclusion that (P2) is implausible, see Olsaretti 2004.

⁶³ “Best improves human well-being” is short for “it is the economic system that best improves human well-being”.

⁶⁴ There are also arguments based on mutual advantage – more on them shortly.

were Hedonists. „Jevons explicitly attempts to develop economics from Benthamite foundations: „The theory (...) is entirely based on a calculus of pleasure and pain: the object of economics is to maximize happiness by purchasing pleasure, as it were, at the lowest cost of pain” (O’Neill 1998, 36). While in early welfare defenses of the market, well-being was understood in *substantive* terms, in modern neo-classical economics the concept of welfare or utility has been re-defined in a formal way, namely in terms of *preferences*. This shift happened due to methodological reasons concerning the „subjectivist“ revolution in economics, and worries about hedonistic and objectivist accounts of well-being (cf. *ibid.*, 37).⁶⁵ The modern textbook economic agent is characterized by a set of preference rules. In particular, the agent is assumed to be rational in the sense that she has consistent, transitive preferences.⁶⁶ The utility, welfare or well-being of the agent is taken to be a function of these preferences. In neo-classical welfare economics “The term utility is defined in terms of a *preference ordering*, such that if x is preferred to y then x has a higher utility function than y. Willingness to pay (...) is used as a measure of preference rankings” (*ibid.*, 36f).

The reliance of modern economics on this formal concept of utility for a welfare justification of the free market is a possible ground for criticism from an ethical perspective. O’Neill for example maintains that „Whether or not something is *of value* to a person depends on the *nature* of the object, its capacities to contribute to the flourishing of a person. Whether an object is *valued* by someone depends upon the nature of the person’s *beliefs* about the object. This logical difference points to the central problem with the subjective determination thesis stated in its crude form, a problem which lies at the heart of both neo-classical and Austrian defenses of the market that employ it. It doesn’t appear to allow for mistakes about what is of value” (*ibid.*, 40f). O’Neill suggests that an adjustment would be needed to ensure its plausibility, namely to understand what is of value for a person as “what the person would desire or value when cognitively competent and fully informed” (*ibid.*, 41).

In the same vein, Sen argues for a return to *substantive* (as opposed to formal) *concepts of well-being* for welfare economics. As we saw in chapter 3.6.3, he employs a broadly objectivist account of well-being which is defined in terms of „functionings“ constitutive of a person’s life, e.g. adequate nourishment, good health, self-respect, participation in a community etc. The measurement of well-being is approached in terms of a persons’ capacities and freedoms to achieve well-being thus characterized (cf. O’Neill 1998, 41).

This being said, let us turn to the general utilitarian argument for the free market on the

⁶⁵ This parallels a shift within modern utilitarianism from the classical hedonistic account to the modern form of preference utilitarianism” (O’Neill 1998, 37f).

⁶⁶ That preferences are transitive means that if she prefers a to b and c to c, then she prefers a to c, if she is indifferent between a and b, and b and c, then she is indifferent between a and c. (cf. O’Neill 1998, 35) Above that, „Her preferences are also taken to be complete, i.e. for all alternatives a and b, either a is preferred to b, b is preferred to a, or the agent is indifferent between them. Her preference structure is also taken to have other formal characteristics: preferences are reflexive and separable.” (O’Neill 1998, 181, FN 2).

grounds that it maximizes well-being. This argument is based on its superior efficiency. More precisely, the utilitarian argument for the free market is translated into economic terms in the form of an argument from *Paretian* efficiency and an argument from *productive* efficiency: "While exchange in the ideal market ensures that an economic pie of a given size will be distributed in a Pareto Optimal fashion, competition – by placing resources in the hands of producers who most closely approximate the least-costly methods of production – increases the size of the economic pie" (Buchanan 1985, 18). In other words, the argument from Paretian efficiency (see below) holds that the free market distributes resources in an optimal way, whereas the argument from productive efficiency maintains that the free market leads to the biggest possible "economic pie".

Let us shortly mention the features of the free market that are taken to lead to the maximal productive efficiency of the system. The first was mentioned in the quotation above: competition puts resources in the hands of the most efficient producers (since the inefficient ones are driven out of the market by the more efficient ones, or forced to become more efficient themselves). Second, the prospect of gaining more in the free market through higher risk-taking or more effort provides the individual with a strong incentive for heightened productivity, which in turn results in increased social utility. Third, the market maximizes efficiency and utility through its decentralized coordination of demand and supply (see chapter 3.8.2).

Interestingly, the argument from productive efficiency has a corollary with regard to moral behavior, which already some of the earliest advocates of the free market, such as Adam Smith and Bernard Mandeville, have suggested.⁶⁷ It holds that the market does not rely on altruistic behavior in satisfying human needs and preferences and that in this sense it economizes on the scarce resource of altruism.

There are several assumptions behind this argument. One is that the scarcity of moral or altruistic behavior is a fact about human nature. As Hume put it, men are generally only capable of "limited altruism" directed toward a small circle of family and friends. It seems to be a psychological reality that the sentiment of altruism tends to lose its effectiveness when we try to extend it to more distant individuals. If this is the case, the free market as a system that organizes large numbers of individuals without depending upon altruism will be more effective in securing human well-being than reliance on people's morality. Besides, it will also "free up" the limited resources of altruism for their realistic, natural function: the effective concern for our close circle of family and friends. In this sense, the argument goes, the free market uses altruism more efficiently than alternative systems.

In challenge to this argument it is usually argued that the empirical assumption at its basis, namely that people's resources of altruism are extremely limited, is mistaken. The counter-argument suggests that limited altruism might not be an unchangeable feature of the human condition, but rather *a product* of the free market system itself. If we are taught that we don't need to behave

⁶⁷ Mandeville (1988) [1732]; Smith 1976, 14..

altruistically because it is not necessary (or even counterproductive) since the free market with its “invisible hand” takes care of this for us, we are presumably considerably less motivated to do so. If this is true, the fact that the market system “economizes” on altruism is, of course, not a convincing argument for the market system (cf. Buchanan 1985, 18). On the other hand, said mind set might be highly problematic in settings that are so far from the ideal market that the argument from efficiency doesn’t hold straightforwardly since it might seemingly “absolve” people of their moral responsibility regarding trade actions on the mistaken ground that the market system somehow has them covered. The global trade system might presumably be a case in point (more on this below).

Let us come back to the welfare economic argument for the desirability of the free market, and accordingly its “fairness” in the broad moral sense of the notion. The argument is closely tied to the free markets *efficiency*. Arguments on the grounds of Paretian efficiency for the free market usually rest on two main claims: (1) a theoretical statement that exchanges in the ideal market reach an equilibrium state that is *Pareto Optimal* (which is a second-best substitute for utilitarian maximization) – the First Fundamental Theorem of Welfare Economics, and (2) the assumption that actual (non-ideal) markets (at least with feasible modifications) sufficiently approximate the efficiency of the ideal market to make them preferable to other arrangements. Central to arguments for the free market on grounds of welfare is accordingly the concept of *Paretian efficiency* and the theoretical concept of the *ideal market*. Both will be examined in the following.

5.2.1.3.1 The Paretian concept of efficiency

The most widely accepted concept of efficiency is that of “Pareto efficiency” developed by Wilfredo Pareto. What it amounts to is explained in the following passage: “A state of a given system is Pareto optimal is and only if there is no feasible alternative state of that system in which at least one person is better off and no one is worse off. A state, S1, is Pareto Superior to another state, S2, if and only if there is at least one person who is better off in S1 than in S2 and no one is worse off in S1 than in S2. These are the most inclusive formulations of the Paretian principles” (Buchanan 1985, 4). The Pareto principle can be formulated more narrowly to refer exclusively to *distributional states with regard to consumer goods (distributive Pareto efficiency)*, or to *allocations of resources for producing goods (productive Pareto efficiency)*. It is important to note that a system can be Pareto superior to another without making anyone better off, if the additional goods produced make no contribution to anyone's well-being. To compare two systems on grounds of productivity one must select some particular set of outputs (e.g. steel and bread) and compare the amount produced to some constant quantity of a type of input. “... it is also necessary to assume that the particular products (outputs) and resources (inputs) that provide the basis for the comparison are *equally valuable* to individuals in the two systems, if productivity comparisons are to be reliable indicators of comparative efficiency, and if we are to assume that efficiency has some relationship to how well

people are" (ibid., 6) This is to assume that interpersonal utility comparisons are possible, that is comparisons of how well off some individual is relative to how well off another is. Productivity as such, as well as the growth rate, or the rate of capital accumulation are no satisfactory measure of a system's efficiency since they might not make people better off, if, for example, it suffered from an inefficient distribution, unless the concept is completely divorced from that of well-being altogether.

Among different principles of efficiency, Pareto Optimality and Pareto Superiority "appear to provide the most comprehensive tools for assessing a system's efficiency, since the notion of a social state they employ is inclusive enough to take into account the way productive resources are allocated, the way production is organized, and the distribution of consumer goods so far as all of these affect how well off individuals are." (Buchanan 1985, 7) Nevertheless, the fact that a state is pareto-inferior to another does not tell us which of the above factors constitutes the problem. The wide acceptance of the two principles is in part due to the fact that they provide a way of assessing social states that does not require interpersonal utility comparisons. While there are different problems with regard to interpersonal utility comparisons, probably the weightiest one is that there seems to be no non-arbitrary way of selecting a common baseline from which different individual's utilities could all be measured, and no non-arbitrary unit of measurement. "Against this background, the two Paretian principles ... are usually seen as second-best alternatives to utilitarianism, the assumption being that assessing social states according to the overall utility they produce would be preferable, were it not for the unfortunate fact that interpersonal utility comparisons cannot be made. The Paretian principles avoid interpersonal utility comparisons by requiring only determining whether each individual is better off or worse off relative to *his own* former condition (ibid., 8).

Examination of this rationale for understanding efficiency in the Paretian way "quickly dispels the *illusion that the choice of a concept of efficiency for evaluating social states is morally neutral*. (...) Identifying the efficiency of a social state with its tendency to maximize overall utility presupposes a morally controversial view of what society is. This point can be best appreciated if we recall ... the most common, nontechnical notion of efficiency: that of an individual's taking the least costly, effective means to achieving some particular end. The concept of efficiency as overall utility maximization involves a twofold extension of the commonsense notion of efficiency: First, it assumes that the utility of all particular ends can be aggregated into the abstraction of a "total social product" or "overall utility". Second, it assumes that comparing social states according to their tendencies to maximize this abstract "superend" is an appropriate basis for making practical, action-guiding judgments about how society should be organized." (ibid., 8f, emphasis added) This second assumption implies that, at least for purposes of practical evaluation, "*society is to be viewed as an apparatus for maximizing overall utility*. This view of society might be incompatible with

according proper respect to individual persons, who ought not to be regarded merely as contributors to ends that are not their own, including the end of maximizing overall utility. The notion of efficiency as using the least-costly, effective means toward one's own end is not liable to this charge because it assumes unity of purpose, abstracts from conflicts of interest, and does not involve using the individual to achieve ends that are not his own." (ibid., 9, emphasis added) Besides, the principle of utility is also morally controversial because it has no space for the intuitively plausible conception that society should be a *mutually advantageous* arrangement (more on this later).

Although the Pareto Optimality Principle avoids the problem of interpersonal utility comparison it is liable against the latter charge against utilitarianism as well: a situation in which a few have everything while most have nothing may in fact be Pareto Optimal, if improving the condition of the unfortunate majority would require worsening the condition of the privileged minority. Accordingly, a social state might be Pareto Optimal without being mutually advantageous in any plausible sense. This is due to the fact that Pareto O focuses only on the satisfaction of preferences, while being blind to other issues that are generally held to be morally relevant, such as the moral assessment of the preferences themselves, or the moral assessment of the process by which a Pareto O State came about. For this reason, i.e. that a social system may satisfy the Pareto Optimality Principle while being highly unjust (or unfair) at the same time, the Pareto Optimality principle does not by itself provide a sufficient standard for moral evaluation. Besides, even a person who benefits from a change may have grounds for complaint, for example, if the change was imposed on her by others without her consent. (cf. ibid., 10) In this sense, the Paretian principles are morally uncontroversial only if they are treated as open to the possibility of opposing moral evaluations. This makes clear that the decision of how much weight is to be given to the efficiency criterion, and how much to moral criteria with regard to the assessment of a particular social arrangement is not a morally neutral decision.

At this point we need to have a closer look at the theoretical conception of the ideal market. We recall that the first claim on which arguments on the grounds of efficiency for the free market usually rest holds that exchanges in the *ideal market* reach an equilibrium State that is Pareto Optimal, and the second claims that actual (non-ideal) markets (at least with feasible modifications) sufficiently approximate the efficiency of the ideal market to make them preferable to other arrangements. The theoretical concept of the *ideal market* is accordingly central to arguments for the free market on grounds of welfare.

5.2.1.3.2 The ideal market

According to economic theory, the following conditions define the ideal market:⁶⁸

1. Full information is available on supply and demand, market prices and consumer preferences, the quality of goods and Services, and the costs of all alternative ways of producing them. The cost of this information is zero.

2. Costs of enforcing contracts and property rights are zero, and property rights, including rights to the means of production, are established and stable.

3. Individuals are rational in the following sense: their preferences are organized in a transitive ordering (such that if an individual prefers A to B and B to C, he also prefers A to C) and they are capable of selecting appropriate means toward their ends.

4. (a) Transaction costs are zero (transaction costs include costs of bringing goods and Services together for exchange, and costs of reaching agreements for exchange, for example, costs of formulating mutually acceptable contracts, and costs of information about potential offers to buy and sell) or (b) there is perfect competition. That is, no buyer or seller can influence prices by his own independent actions, which implies that there are no monopolies. There is complete freedom to enter and exit the market, freedom to switch from one product to another, and unrestricted access to product markets, capital market and credit markets. There are no externalities (an externality is a "neighborhood" or "third-party" effect of a market exchange: an effect on some one's well-being which is not taken into account in the market exchange).

5. Products offered in the market are undifferentiated, meaning that buyers cannot distinguish between the products offered by various sellers, and vice versa.

Pareto Optimal outcomes are guaranteed only if all of these conditions are satisfied. Since these extremely strong conditions that define the ideal market are never met in actual markets, the case for the market on grounds of efficiency depends on the extent to which actual markets do approximate, or can be modified to approximate, the ideal market.

Some approximations to the ideal market are inherent in the theory, namely as a result from competition over time (these are called the *Diachronic efficiencies of the market*): Competition among producers reduces costs of production, since producers who fail to develop and utilize less-costly methods of production are replaced by others who do. Competition among entrepreneurs reduces transaction costs, since those with the least expenditure of their own resources can charge less for their Services and capture a larger share of the market. Finally, the need for information on the part of producers, consumers, and entrepreneurs creates a market for information. In each of these respects, competition in non-ideal markets generates incentives for

⁶⁸ Cf. for example Buchanan 1985, 14f.

behavior that tends toward the more perfect satisfaction of the conditions of the ideal market, in particular, zero transaction costs, full information, and zero information costs (cf. *ibid.*, 16).

In this context, it can be argued that trade is “fair” (in the general sense) *to the extent* that it corresponds to trade in the ideal market, because it is only to this extent that it leads to the most efficient results.⁶⁹ Sometimes this is used *counterfactually*, in the sense that trade is understood as “fair” to the extent that the exchanges would occur in an ideal, perfectly competitive market (cf. e.g. Arnold 1994, 80f). We will consider this position in chapter 6 when discussing exploitation.

On the level of the world trade system, an analogous position claims that *the system of trade between states is fair to the extent that corresponds to an ideal market*, because here too it is to this extent that it leads to the most efficient results. In what follows I will look at this position and its moral grounds.

5.2.1.3.3 *Efficiency and welfare arguments for free trade between states*

Economic theory clearly suggests that international trade puts the participating countries in a better situation than autarky. It also suggests that the freer trade is conducted, the more beneficial it is for the countries involved. For the common sense, this intuitively makes sense: countries possess different natural resources, their climate allows for the cultivation of different foods, they have different traditional, specialized industries etc., so it seems only sensible to profit from a certain division of labor by trade in between them – just as it is sensible to profit from the division of labor inside one country.

Standard economic theory teaches that trade benefits all countries involved, at least in the long run, for another reason. This other factor which according to economic theory speaks in favor of extensive trade is called *comparative advantage*. If country A is better at producing cheese than at producing wine, it should obtain wine by specializing in cheese while trade some of it for wine. If the reverse is true for B, B should trade wine for cheese. A has a *comparative advantage* in cheese and B in wine, even if A is better at (has an *absolute advantage* in) producing both. While there are other reasons for trade liberalization, this insight, going back to Ricardo’s 1817 *Principles of Political Economy*, continues to underlie international economics. Trade theory supports free trade: barriers such as tariffs and quotas obstruct mutually beneficial transactions, and countries should undo them, even unilaterally. The best way for A to get wine is by trade cheese, even if B fails to obtain its wine in a parallel manner (see e.g. Krugman/Obstfeld 2003).

Generally, economists maintain that, while international trade always generates winners and losers, if trade is liberalized by reducing or abolishing protectionist measures the liberalizing country as a whole will win. The reason for this is that, while workers in certain sectors might face unemployment, millions of consumers see small savings because goods get cheaper, and overall

⁶⁹ For a counterargument on these bases against the claim that the current market is fair see 5.2.1.3 d).

what gets lost through unemployment is more than offset by what is gained through lower prices. In technical terms, freer trade satisfies Kaldor-Hicks efficiency. Under Kaldor-Hicks efficiency, an outcome is considered more efficient if a Pareto optimal outcome can *hypothetically* be reached by compensating the losers from the winners so that no one would end up worse-off than before (Cf. Brandi 2011; Hicks 1939, Kaldor 1939). The evidence and the opinion of most economists suggests that in many cases trade liberalization is conducive to growth, given that background conditions crucial for economic activity are favorable. These include most importantly a stable political situation and reliable rule of law (see e.g. USITC 1997; Wacziarg et al. 2003; Anderson 2004; Panagariya 2004).

In sum, free trade between countries is considered to lead to *national income gains* as a result from comparative advantage, economies of scale and the spread of technology and ideas, which increase gains by reducing production costs and increasing productivity. The resulting gains in turn are considered to contribute (indirectly, and in conjunction with factors such as geography and institutional quality) to economic growth (c.f. e.g. Krugmann/Obstfeld 2003).

It is important to note that economists emphasize that the basic argument for free trade between countries, which is based purely on rational self-interest, is unilateral. The value of trade concerns *imports*, which allow for greater productive efficiency and introduce new embedded technologies. The role of exports is that they pay for imports. From this perspective it is argued that a country benefits by dropping trade barriers unilaterally, there being no need for export market access in order to gain from trade. In this perspective then, there is no need for mutuality. As Paul Krugman writes “If economists ruled the world, (...) [G]lobal free trade would emerge spontaneously from the unrestricted pursuit of national interest” (Krugman 1977, 113). Nevertheless, the standard economic case for free trade *does also* suggest that free trade is not purely a matter of national self-interest. According to both “terms of trade” and “strategic trade” theory, under the appropriate conditions market barriers can be optimal for countries. But since the optimal trade barriers are quite difficult to set *in practice*, the costs of regularly getting it wrong, so it is often argued, outweigh the modest benefits of occasional success. Besides, in reality self-interested unilateral optimizing might trigger retaliation from other countries, which could result in mutually destructive trade war. Hence it is in the best self-interest of countries to forgo temporary gains for the sake of mutually beneficial cooperation over the longer haul (cf. Irvin 1996, 216). In fact, historically it was precisely such reasoning that led countries to establish an international trade system, the GATT, in the aftermath of the mutually destructive interwar years.

Stiglitz and Charlton point out that the relation between trade liberalization and growth depends on several factors and is accordingly context dependent. According to them, there are situations in which liberalization may not be an advisable course of action for developing countries (at least in the short run) (Stiglitz/Charlton 2005, ch. 2). They do advise them though to open up their

markets at least to countries that have a smaller economy than them (ibid., 94). This, however is an empirical question and will therefore not be pursued further here.

What is important for connecting efficiency arguments to moral welfare arguments is that it is generally agreed that growth is necessary for achieving broad social benefits (see e.g. UNDP 2003; World Bank 2004). The latter could be understood, for example, in terms of the UN Millennium Development Goals, which are formulated as follows: reducing extreme poverty by half, realizing universal primary education and gender equality in education, reducing maternal mortality by three-fourths and mortality among children under five by two-thirds, reversing the spread of HIV/AIDS and assisting AIDS orphans, and improving the lives of 100 million slum dwellers.⁷⁰ So how does the relation between growth and the social Millennium Development Goals look like?

There are mainly two reasons that are mentioned: first, growth directly reduces poverty for many households, and, second, it increases tax revenues to governments which can (theoretically) be used for improving health care, education etc.

On this basis, what I call the *economic argument from future benefits* is often used to justify bad working conditions and low wages in developing countries. It goes more or less as follows: The main cost advantage of developing countries in export markets is their cheap labor, and this should be fully used in order for their economies to grow (Cf. Chapman 1994, 3). The resulting growth in turn creates more jobs, which benefits the population through more income. Sweatshops (i.e. production sites with bad working conditions) are the necessary first stage in this development. Working conditions improve at a later stage of development as a matter of economic necessity: more demand for labor in relation to its supply leads to companies having to improve their working conditions to attract workers. Besides, sweatshops raise standards of living over time through systemic spillover effects: By drawing people away from rural areas, thereby reducing the labor supply there, rural wages tend to rise too.

Because of the assumed beneficial long term consequences of economic development for whole societies, the “overwhelming mainstream view among economists is that growth of this kind of employment [i.e. sweatshop labor] is tremendous good news for the world’s poor” (Paul Krugman’s statements, Myerson 1997, 3). Even from the perspective of individual laborers, in this view “the best hope for workers in substandard conditions lies in the sustainable improved economic and social conditions that economic growth brings – a durable economic growth that will occur only if developing countries can capitalize on their low-cost advantage to attract development”⁷¹ (Myerson 1997, 2-3). So, “however much we may not like some of what we see in the labor conditions of developing nations, this is the market at work, and the market works to generate overall improvements in economic welfare for a society” (Hartman et al. 2003, 3).

⁷⁰ See <http://www.un.org/millenniumgoals/index.html>.

⁷¹ Of course cost advantages are not the only factor encouraging foreign investment. Highly relevant are factors that minimize the (real and perceive) risks of investing in a certain place, like political stability, the rule of law, exchange rate stability, protection against market intervention, and monopoly structures (Murray 1997, 21).

Assuming that the predictions of economic theory are correct, this argument might give us a reason for accepting, all things considered, some working conditions that we would otherwise not be ready to accept. However, note that it has clear limits. The claim (as voiced in the quotation above) that we should accept whatever negative “collateral damage” the market does on its way to eventual economic improvement is certainly off limits. Outside a very crude form of utilitarianism we are *not* allowed to sacrifice some people’s life and well-being for overall social benefit. It is the task of morality and law to define the *limits* of the market to protect people. The question is not *if* we should set limits to the market but *where* we should set them. This question will be discussed in detail in chapter 6 on “fair trade” in the supply chains of MNEs. As we said before, violations of negative rights are a clear case.

However, there is a consequentialist line of argument that challenges economic theory’s account of the benefits, or *positive externalities*, that employment under poor conditions allegedly brings to a society in the long term. Critics argue for example that the kinds of skills developed in much routine factory work hold no real promise of economic and social development, neither for the individual employee nor for the entire society. Moreover, they argue that the transition from agricultural and cottage industries to factory-based work actually produces *negative externalities*, i.e. social costs that are not covered by the wages paid by an MNE to its employees. An example in point is the social disruption caused by urban migration, as people move away from their informal social support networks of family and village to urban anonymity, being left without any support network at all in the process because public social services are not working or are overstressed (c.f. Hartman et al. 2003, 4).

Which version is more accurate is an empirical question, and accordingly for empirical scientists to decide. I imagine that both arguments might be true under certain circumstances. For the sake of the argument I will assume that the former account is commonly right, that is, that allowing Sweatshop labor actually does have beneficial economic consequences in the long run.

However, as has been mentioned before, per capita growth per se does not necessarily mean that the situation of the poorest people is improved. Often the wealth created benefits only a few, and the poorest are not usually among them. In fact, since most of them live in rural areas they are not the ones who will easily find employment in new factories which are usually located in the proximity of cities – a fact that leads to massive migration from the villages to the big cities, which in turn leads to the creation of huge slums in the outskirts of those cities. As we said, growth is only a morally worthy goal if it is tied to other social benefits.

5.2.1.3.4 Counterarguments against the claim that fair trade is free trade

A first group of important arguments in debates on global fair trade attack the second premise of the argument, that is, they argue that *actual* markets fail to approximate the efficiency of the ideal market to such an extent as to bring the whole argument down. These arguments point to major sources of *inefficiency* in actual markets, and especially global ones.

The aims of the Fair Trade movement can to a large extent be understood in this context. The movement argues that especially with regard to the situation of producers and workers in developing countries many of the conditions of the ideal market are not fulfilled which leads to market failures. For this reason, a big part of the Fair Trade principles aim at correcting these market imperfections. With respect to the moral bases of “fair trade”, this can be understood in terms of fairness in our sense: the market failures disadvantage the producers and workers with regard to their equal opportunity to profit from the free market system. The measure of the Fair Trade movement aim at correcting these disadvantages in the background conditions of market transactions to give producers in developing countries the possibility to participate in the practice of global trade on grounds approximating equality of opportunity.

The main sources of inefficiency, some of which are also being referred to in attacks of the second premise of the argument for free markets on grounds of efficiency are the following:⁷²

- (a) lack of information on the part of producers and consumers
- (b) monopolistic and monopsonistic tendencies,
- (c) negative externalities
- (d) unemployment
- (e) high transaction costs
- (f) the existence of barriers to successful voluntary collective action to secure certain goods which the market cannot provide (public goods problem)
- (g) lack of congruence between the satisfaction of the individual's preferences as they are revealed in the market and the individual's actual well-being.

The most relevant ones with regard to debates on “fair trade” are (a)-(d). Let us have a look at them and how the Fair Trade system attempts to mitigate them.

Ad (a) On the part of producers in developing countries, especially in remote areas, information on market prices, consumer preferences, demand etc. is often very difficult to come by. The Fair Trade movement tries to counteract this problem by providing the necessary information through direct and long-term trade relationships. An additional, highly promising strategy to this

⁷² Cf. Buchanan 1985, 19, additions by the author.

aim focuses on bringing information technology such as cell- phones and internet to remote areas.⁷³

On the part of MNEs and consumers, information on the social conditions of production, the environmental impact etc. of goods is notoriously resource intensive and sometimes difficult to come by. This is information which (at least certain) individuals themselves, “upon considered judgment, would agree is relevant to the making of a reasonable choice, granted ... (their) own stable preferences” (Buchanan 1985, 20). This is the reason why so many advocate *transparency* with regard to social production conditions and environmental impact as a requirement of “fair trade” (e.g. Starmanns 2011). Only if people knew about these things, so the assumption, their purchases could reflect their preferences and thereby integrate them into the market. That they don’t know about these “moral characteristics” of the goods they purchase distorts the market in the sense that their purchases in this respect are not fully informed.

Economic theory is right insofar as this problem has led to the emergence of a market for information on these issues. Most notably, the information is provided by means of certain labels and certifications (like the organic or Fair Trade label). Additionally, many NGO’s are devoted to gather the relative information and make it available to firms and consumers, thereby massively reducing their costs of attaining that information. Nevertheless the general problem persists: it takes a morally *very* conscious consumer to go through all the trouble for getting the relevant information in all realms all the time – it is simply still too resource intensive. For this reason, some demand that certain information regarding the social and environmental conditions of production should be *mandatorily* supplied with the product by the seller (e.g. Zervas 2008). This seems like an interesting suggestion, especially since the demand for transparency is clearly one of the most universally backed and least controversial demands for fairer trade. In this respect it is important to understand that this demand can be voiced from *within* economic theory and sticking to the free market system – via the conditions for the ideal market. However, the verification of this information would entail massive costs and complications, a problem which according proposals would have to solve.

Ad b) Monopolistic tendencies exist when some economic actor can unilaterally influence prices. There are different circumstances which make this possible: restrictions on entry into markets due to licensure, prohibitions against advertising, and trade secrets. Monopolistic tendencies can also result from government support or from collusion among firms to fix prices or drive out competitors. If some firms happen to enjoy unique access to certain raw materials, or if economies of scale make it difficult for new firms to survive long enough to amass sufficient capital to produce competitively, so-called *natural* monopolies can arise and persist without government support. Economist will often argue that both “natural” and collusive monopolies are inherently unstable and tend to break down with time through competition. Advocates of the market often infer, then, that government-

⁷³ This strategy is e.g. pursued by social businesses in Muhammed Yunus’ organizations. Cf. Yunus 2007.

supported monopoly is the only serious threat to efficiency in the long run (Buchanan 1985, 20f).

Whatever the theory says, in the context of global trade there are additional phenomena of monopsonistic tendencies that are highly relevant in practice: In remote regions, producers often have not choice of traders they sell their products to, but are faced with a single option. This factual quasi-monopsony is often ruthlessly exploited by the traders holding them, by buying goods at prices way below the market price.⁷⁴ The Fair Trade movement tries to counteract this problem by organizing producers into cooperatives to strengthen their bargaining power towards buyers with quasi-monopsony power, and by circumventing intermediary buyers prone to abuse their monopsony power by direct trade relationships with producers.

Ad c) Negative externalities of economic exchanges are negative effects (costs) on the well-being of third parties or the environment which are not taken into account in the market exchange and are not included in the equilibrium price of the goods exchanged. From within economic theory negative externalities can be understood and criticized as inefficiencies. Buchanan explains this as follows with the example of a chemical product: “negative externalities can be viewed as inefficiencies of overproduction. More of the chemical is produced than would be produced if the total costs of production, including the costs to breathers of polluted air, were taken into account in establishing the equilibrium price for the product. Because the cost to the producer of producing the chemical is less than it would be if the costs to third parties were included in his costs, the producer can sell the chemical at a lower price and still make a profit. But since more will be sold at this lower price, more will be produced than would be if the total costs, including detrimental third- party effects, were taken into account” (Buchanan 1985, 22).

Negative externalities are an important topic in debates on fair trade. The fact that, contrary to the conditions of the ideal market, negative externalities such as environmental degradation, negative health effects on workers in unsafe environments etc. are *pervasive* is rather uncontroversially seen as a big problem. Suggestions as to how this might be remedied include voluntary agreements, but usually turn to institutional regulation. This is because voluntary measures can easily be blocked by free-rider and assurance problems. On both accounts, each firm has an incentive for noncompliance: it may not comply in order to take a free ride on the compliance of others, or it may not comply because this is the option which maximizes utility in a situation of insecurity regarding the action of the other parties.

There are several ways in which institutional regulatory interventions in the market can try to remedy the problem of negative externalities. Let us quickly look at them. 1. Institutional regulatory bodies might prohibit the behavior that produces the negative externality. 2. Institutional regulatory bodies can allow the activity that produces the negative externality to continue, but tax the producer either in order to a) reduce the volume of production by increasing production costs,

⁷⁴ A related issue is temporary quasi-monopolies that arise in extraordinary situations of need. This is discussed in chapter 7 with regard to exploitation.

and/or b) in order to use the tax- proceeds to compensate those who bear the negative effects of the activity. 3. Institutional regulatory bodies can set and enforce standards which those engaged in the activity must meet. 4. Institutional regulatory bodies can enforce a legal system which allows affected third parties (either individually or in class-actions) to sue for compensation for costs imposed on them by the actions of others. 5. Institutional regulatory bodies might strengthen voluntary measures by enforcing their agreements. 6. Institutional regulatory bodies may create and enforce private property rights in order to "internalize" externalities.

With regard to global trade, the most relevant global institutional regulatory body is the WTO. It would therefore fall unto the WTO to devise strategies like the ones mentioned to counter the efficiency problems of the global free market. As we have seen before, the problem is of course that the WTO doesn't work as a body for finding collective solutions for collective problems (like a national government is supposed to), but rather as a bargaining forum where self-interested parties try to promote their own interests. For the position that free global trade is fair trade this is clearly highly problematic.

Ad d) Unemployment is a highly relevant issue in the context of discussions on free and "fair" trade, mainly with regard to minimal and living wages. For this reason I will dwell on the efficiency arguments on this topic a little longer.

Many economists argue that unemployment, far from being an imperfection of the market, is the result of failure to allow the market to function without interference. Especially minimum wage laws and restrictions on competition for wages due to successful labor unions, so the argument, make it too costly for some employers to hire less-productive workers, which leads to unemployment. The neoclassical argument for the claim that the truly free market eradicates unemployment in some goes like this: "If there is free competition for jobs, then (since the supply of labor relative to the demand for it is high), the price of labor, that is, wages, will decrease. As wages decrease, production costs decrease. In attempting to maximize profits, firms act so as to make the marginal cost of their products (the cost of producing one additional unit of the product) equal to the price of the product. In order to equalize marginal costs and price, firms expand production. But expanding production requires hiring more workers. Therefore unemployment is reduced." (Buchanan 1985, 33f). What can be replied to this argument from within the economic theory?

As Marx and other early critics of capitalism pointed out, there is at least one problem which this argument overlooks: if the additional output is not being bought by consumers firms will not expand production. But the level of consumption and wages are linked: if wages are very low (and a large portion of the consumers pays for its consumption through wages) then aggregate demand will be insufficient, expansion of production will not occur, additional workers will not be hired, and unemployment will persist (this is called the problem of decreasing aggregate demand) (cf. *ibid.*, 34).

To this economists may reply, relying on the work of the eighteenth-century economist J. B. Say, that at market equilibrium every good produced generates an equivalent value of income, and therefore a shortfall of aggregate demand could not exist at equilibrium. But this argument is based on a hidden assumption, namely that enough of the income from what is produced is spent on consumption instead of being saved in some way (Keynes [1936]). Since continued expansion of production (and accordingly the reduction of unemployment) depends on the proportion of income devoted to consumption and investment, unless enough of the income from what is produced is spent on consumption and thereby back into production, not enough expansion will occur to overcome the problem of insufficient aggregate demand and unemployment will continue to exist (cf. Buchanan 1985, 34). However, there is some contrary evidence that suggests that an increase in wages does *not* necessarily cause a raise in unemployment (e.g. Card/Krueger 1995).

This is not a question I can try to decide. Nevertheless, the majority of economists support the claim that minimum wages and union activity do indeed contribute to unemployment, although due to the mentioned problems it assumedly would not go back to zero as neoclassical theory suggests even without them. Assuming this is correct leaves us with a moral puzzle: how should the value of *any* work and accordingly *some* income (even if it pays at sub-subsistence level) for the highest possible number of people be compared with the value of “decently” or “fairly” paid work for the ones currently in the workforce? We will examine this puzzle, which can be seen as central to questions of fair trade, in the section on the level of trade practices of MNEs.

With regard to global trade, according to Stiglitz/Charlton much of the opposition to trade liberalization is based on its negative effects on employment, which flies in the face of the economic standard model. The reason for this seems to be that the models typically assume that there is full employment. Trade liberalization measures are good for a country according to the theory because, as the country's economy specializes in their areas of comparative advantage, they enable resources to be redirected from protected low-productivity sectors to more productive sectors. But with widespread unemployment the picture changes. Trade liberalization is now not needed to ‘release’ resources into more productive sectors because there are enough human resources available, and accordingly trade liberalization may simply move workers from low-productivity protected sectors into unemployment. If this happens, it lowers the country's national income and increases poverty. Since there can be multiplier effects the total impact might even be far greater than the direct effect (cf. Stiglitz/Charlton 2005, 70).

Let us turn to a second utilitarian counterargument to the free market now, which is based on the concept of diminishing marginal utility. It holds that the highly unequal distribution produced by the market fails to maximize social utility (even when outcomes are Pareto Optimal) because a certain redistribution from the better off to the worse off would increase the utility of the worse off more than it would decrease the utility of the better off, according to the law diminishing marginal utility.

The solution suggested for maximizing social utility and welfare is combining the free

market with a social “safety net” that provides a “decent minimum” of basic goods and services for those who cannot attain them for themselves. Giving the market a large role makes use of its (relative) efficiency, including heightened productivity resulting from unequal distribution and its powerful, decentralized way of coordinating supply and demand; ensuring a safety net for the worse off incorporates the fact that, at least for basic goods or capabilities, marginal utility is relatively uniform for all individuals. This solution is implemented in some form in all liberal welfare states. Regarding reaching the ideal balance, “The trick (...) is to set the level of taxation needed to provide the safety net high enough to reap utilities that would not be obtainable in the more inegalitarian distribution of an unfettered market but low enough to avoid excessive reductions of incentives for productivity” (Buchanan 1985, 59).

When relying on welfare arguments for the global free market and accordingly the perspective that everybody’s well-being is central to its justification, this counter argument and the suggestions for remedying the utility problem necessarily seem to *apply to the global level* as well as a matter of consistency. If this is correct, it implies that someone relying on a welfare argument for global free trade would have to take at least a sufficientarian cosmopolitan position in the Global Justice debate that was sketched in part I (how exactly they apply to the global level seems to depend to a large extent on one’s position in the Global Justice debate). This is in fact what e.g. Sen (1980, 1993) does. As we said in chapter 3.6.3,

Let us return to the Fair Trade movement. As we saw it tries to counteract market failures and in this sense can accordingly be seen as trying to enhance the efficiency of the global market. However, the Fair Trade movement is often criticized on precisely the opposite grounds: On the background of the position that free trade is “fair trade” in the sense of improving welfare through efficiency, the social Fair Trade movement is often attacked as promoting *unfair trade*, because it allegedly leads to inefficiencies. The crucial issue in this respect is the floor price for commodities in the Fair Trade system, which is situated outside free market theory. The floor price is independent of the world market price that is determined according to the product and the region of production. It is determined in the following way:

Production costs + living costs + cost for compliance with the FT-standards = floor price

If the world market price is higher than the floor price, the former is paid. If the world market price falls under the threshold of the floor price, the latter is paid. The aim of the floor price is to mitigate the risk of producers constituted by fluctuations of the world market price: when they fall so low that they don’t even cover the production costs this constitutes an existential threat to the farmers.

The argument criticizing the FT-movement on the grounds of the floor price goes that if the traded volumes are substantial, floor prices for commodities can lead to market distortions, mostly in

the form of overproduction, and accordingly to inefficiencies of the market. However, at the current time this argument is not strong because the volumes are much too low to have this effect.

Kurjanska/Risse discuss this question by drawing a parallel between the case of the Fair Trade Movement and the case of subsidies (Kurjanska/Risse 2008). Their common denominator is that are both economically 'inefficient' in that they uphold production beyond what the world market would sustain (ibid., 29). Risse argues that the claims of developing country farmers to be kept in business through the floor price must be justified against the view that supporting Fair Trade harms the development of poor countries. The latter argues that Fair Trade keeps unproductive sectors in business instead of developing those that they are comparatively good at to become competitive on the world market. In this view, Fair Trade accordingly blocks the sustainable development of poor countries (ibid, 31). Although Risse does not say this explicitly, this amounts to arguing that we must weigh the claims of current farmers in developing countries to be kept in business against the claim of *future* inhabitants of developing countries to benefits from a competitive economy.

The question if this criticism is justified is an empirical one, and accordingly answering it is not my task. However, it is important to note that the actual point of disagreement is not necessarily about the Fair Trade system being fair or unfair according to different understandings of fair trade. This perspective and the Fair Trade Movement agree on what would be fair trade, namely trade leading to development for developing countries and an according improvement of their inhabitants well-being. In this sense, they agree on the goal, but they disagree about the *means* to reach this goal. In line with economic theory, Risse's argument relies on the premise that free trade is *better* able to serve this goal than Fair Trade in the long run because it is more efficient.

Let us look at the position that trade is fair if it serves the development of the worst off in more detail.

5.2.2 Position (c) Fair trade is Trade that Serves the Worst off

A position that is often implicitly or explicitly at the base of criticisms of current global trade is the position that "fair trade is trade that serves the worst off". This position can be called the *development perspective* on fair trade. As such, it is often considered an important part of the Fair Trade Movements' understanding of fair trade. As Maseland/DeVaal put it: "The fair trade movement (...) argues that international trade constitutes an improvement if it has beneficial consequences for the poorest groups in the world. This is the moral criterion fair trade uses to judge the consequences of trade" (Maseland/De Vaal 2002, 256). Further, the second special trait of the Fair Trade system which is situated outside the market, namely the social Fair Trade premium, can be interpreted as being based on the development perspective on fair trade. The social premium is added to the price for the goods and paid to the producers' cooperative with the proviso that it is used for social development projects in the community. It is the core of the FT-system as a business-based development strategy.

But the Fair Trade movement is not alone with this understanding of “fair trade”. For example, Article 2 of the Doha Ministerial Declaration, which focuses the Doha Round on the ‘alleviation of poverty’ in developing countries, can also be interpreted as containing this implicit normative principle (cf. Stiglitz/Charlton 2005, 73). And for Stiglitz/Charlton 2005 it constitutes the relevant fairness-standard for judging global trade. They write that “Every agreement that differentially hurts developing countries more or benefits the developed countries more (say, as measured by the net gains as a percentage of GDP) should be presumptively viewed as unfair. Indeed, it should be essential that any reform be *progressive*, i.e. that a larger share of the benefits accrue to the poorer countries” (Stiglitz/ Charlton 2005, 75f).

Formulated in our standard form, the position can be spelled out as the claim that “trade is fair if it serves the worst off”. In terms of analytical classification, the normative assessment of this position focuses on the outcome of trade. In my terminology it is a position on *just trade* since it concerns the distribution of benefits from trade and, more specifically, since it judges trade against a conception of (global) distributive justice. It accordingly reads “trade is just if it serves the worst off”. The subject of the claim’s presumed moral duties to ensure fair trade are countries. The according duties ask of them to ensure that global trade is structured in such a way that it benefits the worst off (these can be either countries or individuals, depending on the approach).

The argument for the claim that “trade is fair if it benefits the worst off” can be understood as follows:

(P1) Trade is just if it fulfills the relevant criterion of global justice

(P2) The relevant criterion of global justice is that the worst off must be benefitted

(C) Trade is just if it benefits the worst off

Let us focus on the normative grounds of (P2). There are several principles of justice that could serve to ground (P2), the most prominent of them being the Difference principle (see chapter 3.7). It demands the evaluation of entire institutional structures from the point of view of the worst-off persons, or, in an interpretation of the case of the international economic system, the worst-off countries. If the difference principle is indeed the relevant criterion for just outcomes of the world trade system, its rules should be arranged in a such way that they are to the greatest benefit of the least advantaged countries; or at least that they are to a greater benefit of the least advantaged countries than of the developed ones.

Stiglitz/Charlton invoke the Difference principle as a criterion for judging “the fairness of particular trade agreement proposals” in the following passage: „Rawls method generates basic principles of justice that provide some guidance in evaluating the fairness of particular trade agreement proposals – in particular his ‘Difference Principle’, that ‘Social and economic inequalities

are to be arranged so that they are (...) to the greatest benefit of the least advantaged' (Rawls 1971, 83)" (Stiglitz/Charlton 2005, 81).

As Boda (2001, 17) argues, Rawls' concept of "justice as fairness" and his difference principle are useful conceptual tools for interpreting the claims that preferential treatment in trade policy is a demand of justice. On the assumption that free trade does not sufficiently benefit developing countries, according to the difference principle some mechanisms, like preferential treatment or compensatory schemes, might be needed in order for global trade to qualify as just. Additionally, Rawls' concept of "justice as fairness" and his difference principle are useful conceptual tools for interpreting the normative content of the 1970s development discourse (ibid.).

Assuming for the sake of the argument that the Difference principle is plausible as the criterion for judging the outcomes of global trade, however, note that "some of the difficulties of evaluation and comparison which plague consequentialists recur here: in this context a maximin principle needs the information with which to make maximizing judgments about very complex phenomena. Since international interdependence is intricate, it is hard to know which institutional changes would *most* improve the lot of the poorest in the world" (O'Neill 2010, 72).

Indeed, the discourse on the equity of the international order lost a part of its significance in the 1980s and 1990s due not only to political, but also theoretical changes. The neoclassical economic discourse (historically fueled by the bad experiences of the 1970s' government failures) stresses the importance of the liberalized market in creating welfare. As we saw in the section on welfare arguments for the free market, they argue that development needs are best met by trade liberalization. In this sense, the welfare argument for a global free market could *as well* be construed as being based on something like the difference principle. If it were, the welfare argument and position c) could be said to agree on the normative principle of outcome justice, namely that the situation of the worst off needs to be improved, whereas they could disagree on the *means* to achieve this (defenders of position c) could e.g. claim that differential treatment measures were needed to implement the desired goal).

With regard to the plausibility of (P2) and position c) as based on the Difference principle, it is important to note that it is dependent on a particular view in the debates on global justice, namely a particular cosmopolitan position (see chapter 3.7.2). As we saw there, it is highly controversial if the difference principle can plausibly be applied to the world as a whole. For my part, I doubt that this is plausible.

However, (P2) and position (c) could also be based on a less controversial principle, namely for example on a minimalist conception of global justice in a sufficientarian sense (see 3.7.2). Stiglitz/Charlton point to this possibility as well when they write that alternative frameworks to the Difference principle such as Sen's capability approach would, in the current context, arrive at quite similar views (Stiglitz/Charlton 2005, 81).

Note that whatever criterion we accept regarding global justice, for (P1) to be plausible too we

need additional reasons to explain why it should be *trade* as opposed to other distributive mechanisms that has to ensure the fulfillment of the respective criterion of justice. That is, the question with regard to (P1) is if trade has to comply with a criterion of justice at all, or if its role should merely be seen as concerned with maximizing efficiency (see chapter 5.2.1.3). This refers back to general questions regarding the legitimation of free trade (see chapter 5.2.1). However, as position (c) explicitly refers to an ethical criterion for the assessment of trade we will not dwell on this here.

5.2.3 Position (d) *Fair trade is Trade the Terms of Which Ensure Reciprocity and Impartiality*

The next position we will discuss is position d) *Fair trade is trade the terms of which ensure reciprocity and impartiality*. The subject of fairness judgements here is trade in the sense of a *practice governed by certain "terms of trade"*, whereas the fairness criterion applied is *reciprocity and impartiality*.

Formulated in our standard form, the position can be spelled out as the claim that "trade is fair if the terms of trade are fair, and the terms of trade are fair if they ensure reciprocity and impartiality."⁷⁵ It is accordingly a position on the structural or background fairness of trade.

The demand for reciprocity and impartiality here concerns on the one hand trading countries, and on the other hand economic actors within them: e.g. a manufacturer in B should have the same chance to sell goods to consumers in A as a manufacturer in A has to sell to consumers in B. Cf. Miller 2010, 9). The duty bearers are the states that set and apply the terms of trade, and their duty consists in setting fair, that is, reciprocal and impartial terms of trade.

According to position d), fairness demands that trading partners apply the same terms of trade to the imports and exports of the others (cf. Miller 2010, 9). With regard to tariffs for example, if state A is trading with state B and B imposes a tariff on goods imported from A, position d) holds that A can impose the same level of tariffs on goods imported from B, but not a *higher* tariff; if B imposes no tariff at all, A mustn't impose one either. The same applies to other aspects of trade, for example import quotas or export subsidies.

In this sense, the principles of reciprocity and impartiality appear prominently in trade negotiations. The WTO operates on the basis of reciprocal tariff concessions (cf. Suranovic 2000, 298f), and the principles are incorporated in the so-called *Most-Favored Nation rule*, one of the most fundamental GATT/WTO principles. The principle holds that members may not discriminate among other WTO members with regard to tariffs they impose. This means that a country has to offer the lowest import tariff it offers another country on a particular good to all other signatory countries of the

⁷⁵ In the literature this is sometimes expressed as a principle regarding trade negotiations, namely that each party should match the concessions offered by the other (ibid.; cf. Brown/Stern 2007).

WTO (cf. Suranovic 2000, 289).⁷⁶

Let us look at the ethical grounds of the claim that “trade is fair if the terms of trade are fair, that is, if they ensure reciprocity and impartiality”. The basic argument can be understood as follows:

(P1) Trade is fair if the terms of trade are fair

(P2) Terms of trade are fair if they are reciprocal and impartial

(C) Trade is fair if the terms of trade are reciprocal and impartial

(P1) states that for trade as a practice to be fair, a necessary condition is that its structural or background dimension must be fair. As the reflections in chapter 3.5 showed, this is plausible.

What about the normative grounds of (P2)? The demand for reciprocity can be understood directly in terms of justice as reciprocity (see chapter 3.1). Its subjects are the states themselves as actors who negotiate reciprocal trade agreements. As I see it, it doesn’t make sense to apply this criterion to producers in different countries because there is no reciprocity among *them* even if the terms of trade are fair.

However, the demand for impartiality can be understood as applying both to states and economic actors with them. It is based on the fairness standard of impartiality (see chapter 4.2), or can be understood in the sense of not unfairly disadvantaging others (see chapter 4.7): If states offer the same trading conditions to all of their trading partners, they create impartial terms of trade and (at first sight) thereby don’t disadvantage any trading actors within their territories.

However, when taking a closer look this position entails an obvious problematic when applied to trading actors from different countries: As we saw in our discussion of fairness standards, formal impartiality is only fair when participants are in a similar situation regarding the relevant respects, and if that is not the case, we must compensate for existing disadvantages. In other words, on the basis of the fairness standards of not disadvantaging others established in chapter 4.8., if the competition is to be fair, some measures must be taken to counteract the disadvantage of the latter, e.g. by giving him a head start over the former.

Applying this to the case of trading countries, formal impartiality doesn’t take the relative strength or weakness of the potential trading partners in to account – for example with regard to the scale and level of development of their industries. An analogy for this would be a race between a younger and an older child, where the difference in development due to the age difference puts the younger child at a clear disadvantage compared to the older one if the terms of the race are the same for both. If their situations are different in such relevant respects, producers in one country may be at a considerable disadvantage compared to the producers in the other when formally impartial or reciprocal terms of trade are in place. To counteract the disadvantages of less developed countries

⁷⁶ For a further analysis of the fairness principles that were invoked in the Uruguay round of GATT negotiations see Albin 2001.

with regard to the rationale of trade (i.e. mutual benefit), a qualified version of impartiality is required, which calls for applying different sets of rules to various trade partners. In this vein, Stiglitz argues that the principle of “reciprocity for all and among all countries – regardless of circumstances” should be replaced by the principle of “reciprocity among equals, but differentiation between those in markedly different circumstances” (Stiglitz 2006, 83).⁷⁷ Stiglitz/Charlton argue along these lines when they write: „One of the purposes of trade liberalization is to ensure that foreign producers are treated ‚fairly‘. But again there are questions: ‚What does fairness mean in this context?‘ Foreign producers and domestic producers are often inherently in different situations. In the case of a developing country, the foreign producer may have greater access to capital. He almost surely has greater access to international technology. Much of the debate about protection concerns ‘levelling the playing field’, correcting these initial inequities“ (Stiglitz/Charlton 2005, 78).

In other words, the different background conditions of countries and their producers in terms of access to capital and technology might require remedying on the basis of the fairness standard of non-disadvantaging and the principle of equality of opportunity. in the form of “special and differential treatment” of poor countries. At least in theory, this idea has also been accepted on the WTO level.⁷⁸

A major argument brought forward along these lines is the infant industry argument. It roughly holds that exposing non-developed industries in developing countries to competition from highly developed industries from developed countries puts the former at a severe disadvantage compared to the latter (because of the level of technology, economies of scale, etc.), which makes it highly unlikely for them to develop and survive. Accordingly, the argument goes, protectionism is required until the industries in developing countries have caught up to a sufficient degree. This idea was for example incorporated in the GATT provisions that allowed developing countries to protect their infant industries against competition from big corporations in developed countries (cf. Miller 2010, 10).

Based on the same moral grounds, Stiglitz/Charlton argue: “(...) what cannot be justified in terms of either (efficiency and fairness) are developed country non-tariff barriers, such as dumping, which treat developing country producers *disadvantageously* relative to their own, subjecting them, for instance, to a far higher standard for what amounts to predatory behavior than that to which they subject their own firms. By the same token, it is hard to justify demanding developing countries to

⁷⁷ In a similar way, Kapstein 2006 distinguishes between ‘specific’ and ‘diffused’ reciprocity in his discussion of international fair trade

⁷⁸ On 14 November 2001, a WTO Ministerial Declaration including the following paragraph was adopted: “We agree that special and differential treatment for developing countries shall be an integral part of all elements of negotiations and shall be embodied in the schedules and concession and commitments and as appropriate in the rules and disciplines to be negotiated, so as to enable developing countries to effectively take account of their development needs, including food security and rural development” (paragraph 13).

provide *foreign* firms with *greater* protections than provided to domestic firms. While there is some debate about the validity, or abuse, of the infant industry argument, there is no argument for protection of the ‘grown-up’ industry” (Stiglitz/Charlton 2005, 79, emphasis added).

I agree with this judgment on the moral bases of our fairness standard. However, even if such fairness considerations speak against protecting domestic producers in developed countries, there might be arguments on *different* moral grounds for protecting (certain) producers in developed countries. One such argument holds that a country has more weighty obligations towards its own citizens than it has towards foreign ones and is therefore required to protect the former against harsh competition from the latter. Another argument which applies both to developed as to developing countries holds that a country has weighty moral reasons to protect *specific* domestic sectors, most notably the one that has led to most controversies regarding protectionist measures: the agricultural sector. The main moral bases for this argument are considerations of food security.⁷⁹ We will explore these arguments in chapter 5.

For now, let’s turn to another position on similar moral grounds.

5.2.4 Position (e) *Fair trade is Trade on a Level Playing Field*

Position e) understands “fair trade” as trade on a level playing field in terms of the standards that apply to producers (mainly ecological and social requirements). This understanding is at the base of the understanding of fair trade as requiring a *harmonization of standards* (cf. Bhagwati and Hudec 1996). Reconstructed in our standard form, the position reads: “trade is fair if the same requirements apply to all trading actors.” The subjects of the claim’s presumed moral duties to ensure fair trade in this sense are the trading system, that is the WTO, or more precisely the member states who decide on the rules of the world trading system. The duties that exist according to position e) demand of them to establish harmonized standards on a global scale. With regard to our classifications, the position concerns *background fairness*. Since, formulated in the above sense, it focuses on relative advantages and disadvantages in the background conditions, it is a position on grounds of fairness proper. The argument reads:

(P1) Trade is fair if it is impartial

(P2) Trade is impartial if the same requirements apply to all trading actors

(C) Trade is fair if the same requirements apply to all trading actors.

On these grounds, an argument is sometimes brought forth in favor of protectionist measures in developed countries. It holds that it is unfair to domestic producers to expose them to the foreign

⁷⁹ Other arguments point to the reduction of carbon dioxide emissions through shorter transport ways, the preservation of culture and traditional landscapes, etc. See e.g. Taka 2010, 148 and 150.

competition because the former are at a disadvantage compared to the latter who have to comply with lower standards, and have much cheaper labor costs. In this sense, protectionism is defended by arguing that trade is fair only if it takes place on a *level playing field*, and in case this is not given (which is the situation today) this gives countries the right to protect their producers against the unfair competition from abroad.

Before discussing the plausibility of this position, let me introduce a closely related position that is brought forth by Georgios Zervas (2008). Like the position just presented he argues that the current competition in the global market place is unfair because of the highly unequal conditions for different competitors. Zervas claims that “as long as the problem of a true neutrality of the market is not solved we don’t have fair trade” (ibid., 20).⁸⁰ According to him, the goal with regard to “fairness” in trade is the establishment of a level playing field, guaranteeing true neutrality of competition (ibid., 22). Zervas goes on to explain that what he means by neutrality of competition is that the same core standards apply globally for all entrepreneurs and firms (ibid., 22). In other words, he advocates the “implementation of transparent eco-social background conditions for everybody who wants to participate in world trade” as a demand of “fairness” in trade (ibid., 19). He continues that competition under completely unequal conditions can be “free” but at the same time “highly unequal, antisocial and non-ecological, and accordingly deeply unfair”. The incorporation of all external costs and effects of the market *into* the market, he argues, is highly important for the correct and fair functioning of the market (ibid., 23).

Like in the standard mentioned above, Zervas’ basic claim that fairness in global trade requires to the same standards for all participants is based on an understanding of fairness as unqualified impartiality, and the normative grounds this part of his position accordingly concern fairness proper.

However, Zervas also invokes another understanding of “fairness” when he claims that when market conditions are “unequal, antisocial and non-ecological” they are “accordingly deeply unfair”. Here he uses “unfair” in a general moral sense as meaning “ethically wrong”. In my terminology, this part of his position is accordingly about *ethical trade*.

How plausible is position e) in general, and Zervas’ position in particular?

The aim in terms of *ethical trade* of Zervas’ proposal is solving the problem of negative social and ecological consequences of global trade on the systemic level of the institutional background conditions of global trade. “The firms (...) cannot solve this (problem) as long as they are caught in the system of unregulated competition. The current trade system *forces* them to implement the lowest possible production costs for the biggest part of the global market”(ibid., 18, emphasis added).⁸¹ With this, I agree. I take it that the global implementation of high ecological standards and higher social standards is a highly plausible demand from the perspective of *ethical*

⁸⁰ Here and in the following: author’s translation.

⁸¹ More on this argument in chapter 7.

trade.

From the perspective of *fair trade*, as a demand of background fairness it is required that all participants can participate in trade on fair terms. This means that Zervas is right to claim that it is unfair from the perspective of *institutional* background conditions if producers from industrialized countries have to comply with high ecological and social standards whereas others don't, because the additional costs this generates for them puts them at a disadvantage compared to the others.

However, from the perspective of fair trade the picture is more complicated than Zervas assumes: Background fairness doesn't look exclusively at *rules* with regard to the background conditions, but includes other aspects in its assessment as well. Recall the cartoon of the different animals that are all supposed to climb a tree according to the same rules, but where the competition is nevertheless deeply unfair because of other factors that make for highly unequal chances for success. In this sense, an assessment of background fairness takes into account that producers from developing countries are currently *themselves* disadvantaged with regard to many issues such as the state of their industries, technology in general, access to investment etc. In view of this, it is highly questionable that our assessment of background fairness, all things considered, would result in the conclusion that we must harmonize the standards to counteract the disadvantage of producers from industrialized countries.

In view of the fact that we presumably *should* implement high ecological and social standards as a demand of *ethical trade*, fairness as qualified impartiality demands that we don't simply impose such harmonized high standards overnight and require everybody to comply with them, because this would put high costs on producers in developing countries, who are often far from reaching the suggested standards, whereas they put almost no costs on producers in industrialized countries since they have implemented these standards already. This would obviously, at least in the short term, serve the companies in industrialized countries whereas it would put the ones from developing countries under high pressure and possibly out of business. Fairness as qualified impartiality would require *assisting* developing country producers in the process of adjusting to the higher standards.

5.2.5 Position (f) Fair trade is Trade the Burdens and Benefits of Which Are Distributed Fairly

Let me now turn to position f) fair trade is trade the burdens and benefits of which are distributed fairly. A position along these lines, admittedly in a much more sophisticated and rather complex form, is prominently defended by Aaron James. James theory is to my knowledge the best developed theory of fairness in international trade to date.

Before presenting his theory, let me anticipate the answers to our analytical questions with regard to position f): 1) It concerns the *outcome* dimension of trade, that is, the distribution of burdens and benefits from trade. In my terminology position f) is a position on outcome fairness, or, if

it is embedded in an encompassing conception of distributive social justice, a position on *just trade*. Formulated as a claim regarding the necessary and/or sufficient conditions for trade to qualify as fair, position f) reads: trade is fair *if it distributes the burdens and benefits generated by it fairly*. The subject of the claim's presumed moral duties to ensure fair trade is the global trading system and with it the states that shape it, and those duties presumably ask of them to structure the global trading system in a way that leads to a fair distribution of burdens of benefits.

The basic normative grounds of the claim consist in the following argument:

(P1) Cooperation is fair if the burdens and benefits generated by it are distributed proportionally

(P2) The global trading system is a case of cooperation

(C) The global trading system is fair if it distributes the burdens and benefits generated by it proportionally

Since in chapters 3.5 and 4.7 we saw that the fairness standard expressed in (P1) is plausible with regard to cases of cooperation, the plausibility of position f) accordingly hinges mainly on (P2).

If one thinks that fairness in the context of trade should be understood as concerned with sharing burdens and benefits, it might be argued that fairness requires that those who face the main burdens of trade should get support from those who receive the main benefits from it, thereby leading to the burdens and benefits being more equally shared. Understood in this way, fairness might require that the people facing the main burdens of trade liberalization should be compensated with part of the gains of the winners. This amounts to claiming that fairness requires that the compensation which is hypothetically possible in the Kaldor-Hicks efficient liberalization scenario should be effectuated in *reality*. Such a "Compensation View" is defended by James, who argues that trading nations should compensate the losers of international trade with part of the winners' gains (James 2005a; 2012). In what follows I will present and explore James' much more elaborate version of this basic claim. This is a highly interesting topic for our purpose since James explicitly develops the moral foundations of his theory in a thorough way.

According to James (2012), a theory of fairness in international trade should answer at least three questions: 1. What subject exactly are we to assess as fair or unfair in the trade context? 2. What sort of fairness issue does this basic subject of assessment raise? 3. What moral principles must be fulfilled if trade is to be fair in the relevant sense? In his paper "A Theory of fairness in trade" James offers answers to these three questions which he derives from a broadly Rawlsian "constructivist" methodology.

According to James, the basic subject of fairness in trade is an *international social practice of market reliance*, whereby countries mutually rely on common markets (in goods, services, or

capital) for the sake of the “gains of trade” (James 2009). Similar to Carr’s view on fairness, he accordingly understands fairness as relevant with regard to particular social practices. The relevant, existing social practice is in James’ view that countries do comply (more or less) with a system of “market reliance expectations” for the sake of mutually shared ends. A chief *function* of this practice is to regulate trade according to international rules, including formal trade law (e.g. WTO rules) and “informal understandings of how the balance between market and state is to be struck (e.g. the post-war “embedded liberalism” compromise)” (ibid).⁸² According to this perspective, these rules and understandings represent substantial market reliance expectations, which constitute the terms of participation in the larger market reliance practice.

This market reliance practice can be organized in different ways, with varying consequences for different countries and their respective producers, consumers and various classes. The collective choice of how to organize the practice, mainly through negotiated agreements, is therefore the *subject* of considerations of justice or fairness. In James’ view, these are requirements of *structural fairness*, which concern how a given system distributes the *benefits and burdens* it creates, among different countries and their respective classes. To judge the international market reliance practice as structurally fair (or equitable in his terminology) means that it distributes the benefits and burdens it creates *according to a pattern that is reasonably acceptable to every country and class affected*. Conversely, to judge the practice as unfair (or inequitable) is to judge that it is or would be reasonable for some not to accept the organization of the practice, given the available institutional alternatives (ibid). In this sense, James holds a social contract view of the international trade system.

This account makes questions of the fairness of the international trade system independent of other moral issues, like humanitarian concerns with poverty, the Global Justice debate, or human rights external to the global economy.

James argues that the basic requirements of structural fairness lead to certain principles which concern the distribution of, on the one hand, the *harms* of trade (such as unemployment, wage suppression, and income volatility that diminishes lifetime savings), and, on the other hand, the *gains* of trade (as specified by classical trade theory, including the national income gains due to greater allocative efficiency in the division of labor, economies of scale, and the spread of technology and ideas. He formulates the following three principles:

- 1) The principle of *Collective Due Care*, which demands that trade nations must protect people against the harms of trade (either by temporary trade barriers etc., or, under free trade, by direct compensation or social insurance schemes). Specifically, no person’s life prospects are to be worse than they would have been had his or her society of origin been a closed society.
- 2) The principle of *Domestic Relative Gains*, which demands that gains to a given trade society

⁸² Cf. John Ruggie 1982 and Robert Howse 2002.

are to be distributed equally among its affected members, unless inequality of gain is reasonably acceptable to them all (e.g. according to domestic distributional principles).

- 3) The principle of *International Relative Gains*, which demands that gains to trade nations, are to be distributed equally (as adjusted according to the relevant endowments of each, like population size and level of development) , unless unequal gains flow to poor countries (e.g. via special trade privileges).

James argues that his principles have the advantage of not requiring comparisons of gains for any two individuals of the world, since harm is understood in an absolute sense, whereas the gains are compared only between individuals *within* a single society (under the second principle) and the distribution of gains across societies is evaluated at the level of whole countries (under the third principle). This distinguishes them from imaginable principles of “global” or “cosmopolitan” fairness that would directly compare and limit the relative gains of any two individuals anywhere in the world. He opposes the latter since what raises the fairness issue in international trade is the special kind of *social relationship* that embeds the international market relations. In this international market reliance practice, the parties to the practice are *countries*, which makes them the holders of any egalitarian claims concerned with *relative* gains or losses. “For such claims are essentially tied to *the type of good the trade relation is intended to create*, and the ultimate aim of international market reliance is for *countries* to mutually increase national income (via productivity-enhancing specialization)” (ibid., 5). This perspective on fairness in global trade has the benefit of generating significant (if limited) egalitarian requirements of distribution relying only on relatively undemanding, plausible assumptions.

James’ position relies mainly on two moral grounds: 1) an account of the *subject* of fairness considerations along the lines of Carr’s suggestion of fairness as being concerned with the aims of social practices, and 2) a Rawlsian account of social justice as requiring the *justifiability* of collectively sustained social institutions and practices in light of their distributive consequences (regarding burdens and benefits) to everybody, which is egalitarian in the sense that differences in treatment under the common structure are assumed to be arbitrary unless they can be justified as acceptable (not reasonably rejectable) to everyone affected (along the lines of Scanlon’s contractualism on what we “owe to each other” (in the context of international trade)).

Ad 1) The focus on concrete social practices as the subject of fairness considerations is the reason why James objects to the idea of *directly applying the original position to determine what principles would reflect a fair agreement*. The latter would imply using the Rawlsian thought experiment to ask directly what system of international trade people would agree to live under behind the veil of ignorance regarding their country of origin and social position. This proceeding, James argues, would be methodologically unsound by making unjustified controversial assumptions regarding the represented interests, levels of ignorance, and form of the arrangement. To justify such

assumptions, James argues, an independent characterization of the nature of the social structure at issue is required, in light of its basic aims and organizational form, and a specified set of relevant interests and claims. For this, “The proper methodology, in the first instance, is a constructivist blend of morally informed “constructive interpretation” of the organization and aims of the social reality in question, of substantial moral explication of the morally relevant interests at stake, and of reasoning about what organization, if any, is reasonably acceptable to each person affected, in light of those relevant interests. Then, but only then, can we consider with any confidence how the original position representation of reasonable acceptability might go.”⁸³ His basic *thesis of social interpretation* is that the global marketplace is currently fundamentally organized and shaped by an international market reliance practice, for the sake of mutual national income gains. His basic *moralized interpretive thesis* is that this practice is of a sort that triggers the egalitarian considerations of structural equity, i.e. the fairness principle of sharing burdens and benefits fairly. He defends his three principles on the basis of *substantial moral considerations about what people can reasonably accept* (ibid., 8).

Let’s look at these interpretations in detail one by one. First, it needs to be justified that trade is indeed best seen as an international market reliance practice, and particularly that this market reliance reflect a truly *common* practice, or cooperation, as opposed to a coincidence of purely unilateral decisions. James argues for this assumption by arguing that the choice of reliance is based on expectations of similar reliance by other countries, for the sake of mutually understood and shared purposes. He argues that the multilateral trade system is in fact a historical social contract in just this sense (ibid., 9).

As we remember from above though, the basic economic argument for free trade is *unilateral*. If the practices of the world trade system were interpreted as a mere coincidence of unilateral action, this would not imply the sort of *mutuality* needed for a common practice, and would not raise fairness demands either. But as we also remember, mutuality is built into the trade system because it is seen to be beneficial in the long run (ibid., 10). As James argues, in reality a country’s choice for free trade is taken in full awareness of the similar choices of other countries, possibly based on a common understanding of its benefits, and this becomes an established arrangement which all countries rely on. This, he argues, justifies the interpretation that there is the sort of *mutuality* of the kind that triggers the fairness demands that require that the relative social practice be assessed on its own terms, according to the principle of sharing burdens and benefits equally (ibid., 10-11).

James goes on to argue that if this is correct, then market reliance is a form of *participation*. “At the minimum, countries participate by maintaining trade policies (whether tariffs and quotas or “behind the border” measures such as subsidies, internal taxes, or preferential rules) that allow a common market to exist; if trade barriers are high enough, cross-border business will (aside from the

⁸³ This approach is explained in detail in James 2005b.

occasional “black market”) all but cease. Beyond the minimum, participation involves compliance with established market reliance expectations, including both treaty rules and informal understandings of what it takes for the common market relations to be beneficial in the intended ways. Once a country meets a basic set of such expectations, it counts as full participant in the practice, thus enjoying the presumptive claim of every co-creator to a greater rather than a lesser share of the cooperative practice’s intended fruit” (ibid., 12).

Let’s turn to the aim of the practice of market reliance expectations. The answer is according to James *national income gains*. (As was mentioned before, these are a result from comparative advantage, economies of scale and the spread of technology and ideas, which increase gains by reducing production costs and increasing productivity). “The basic, presumptively legitimate and generally understood aim of mutual market reliance, as first specified by Adam Smith and as refined by David Ricardo, Robert Torrens, and James Mill, is mutual augmentation of national income” (ibid., 12). The resulting gains in turn contribute (indirectly, and in conjunction with factors such as geography and institutional quality) to economic growth.

James argues against assuming the welfarist position that the aim of trade is to promote mutually beneficial transactions for the sake of human well-being. While he believes that this might be one possible normative *justification* of international trade, he argues that it is not its basic presumptively legitimate and assumed *aim* of the international practice – national-level income gains are (ibid., 13). These may or may not translate into welfare for countries overall or for individuals.

On the basis of the above arguments, James argues that the mere existence of the mutual market reliance practice suffices to generate a collective responsibility of fairness in the Rawlsian sense outlined above. Accordingly, each participating country has a duty to negotiate toward and comply with the terms required for a structurally fair practice, which implies that the burdens and benefits created by trade, across countries and within their respective classes, must be distributed in a way that no one can reasonably reject. “In particular, levels of *relative* loss or gain are crucial. If countries really are jointly creating goods that would not otherwise exist - goods that would not exist under universal autarky - then each such participant has a presumptive claim to greater rather than lesser shares. Perhaps special reasons for inequality of shares can be given, as particular cases require. The crucial point is that such special reasons *have* to be available if the shared practice is to be regarded as a reasonably acceptable, structurally equitable practice” (ibid, 13).

In a next step James turns to the *implications* of his framework in terms of the requirements it leads to. For deciding what should be understood as the burdens and benefits to be fairly distributed, they are the benefits and burdens that would not exist under general economic autarky (e.g., in a state system without economic globalization), *and* that are attributable specifically to the international market reliance practice. The question then is what this “international market reliance practice” entails, and what are to be considered the relevant gains and losses. The clearest

candidate seems to be the multilateral trade system, especially given its rule-based nature and judicial and enforcement mechanisms, and the gains and losses considered by classical trade theory.

Regarding the distribution of gains and losses from trade, a standard suggestion in economics is that a society can choose to compensate the “losers” from trade with some part of the “winners” gains (e.g., via a tax and transfer scheme, or domestically funded social insurance institutions). As we saw before, the mere *possibility* of providing such compensation implies that free trade is “better for the nation” than market protection. Conversely, James argues that fairness demands that this compensation is *actually provided* – especially if the disaggregated cost of compensation amounts to a small or moderate part of each winner’s gains (ibid., 18).

As James recognizes, a closer definition of the “losers” of trade in the relevant sense is necessary. He suggests three grounds for considering someone a loser in the required sense: reasons of harm to lifetime prospects, of acceptable risk, and of burden sharing. With regard to the first, someone’s life prospects are to be seen as harmed by trade if they are worse than they would have been had his or her society of origin been closed to trade. He argues that this applies e.g. to developing country farmers who are arguably net losers for their exposure to rich country agribusiness subsidies, in the sense that they would have been better off had their society never opened its borders (ibid., 19). In such cases, his principle of Due Care requires compensatory arrangements are made. These may include, in developed countries, “direct payments and/or social insurance, in the form of unemployment and wage insurance, pensions, education subsidies, job training and job placement, employment- stimulating public investment, and so on. In developing countries, where institutional schemes can be difficult to establish and maintain, appropriate measures include public investment, government purchase of goods and services, temporary, revenue-generating trade barriers, infant industry protection, and so forth” (ibid., 21). A crucial implication of Due Care is that the responsibility to fund and establish such compensatory measures does not stop at a given country’s borders, but rather is a *collective* responsibility of countries who participate in the practice. “When any country cannot afford the necessary compensatory schemes, its trade partners are obligated to help fund the measures needed for the shared market reliance practice to be fair to all” (ibid., 21). More particularly, he argues that it requires “the establishment of relatively autonomous international institutions for the maintenance of domestic social safety nets (as enforced, if need be, within the WTO)” (ibid.).

James argues that the fact that the relatively less well-off bear the chief burden of a society’s enjoying the gains of trade gives them an *especially weighty* claim to greater shares. Here the relevant “losers” are specified in terms of the relative hardships that relatively poor people face as compared to relatively rich people within the same society. For example, since income volatility as a result of international trade is more likely to diminish the displaced, low-skilled worker’s life time prospects by diminishing his ability to save and ultimately retire, “wage insurance, beyond mere

unemployment insurance, is arguably only fair" (ibid., 25f).

Let's turn to James claims and arguments regarding the gains of international trade. James argues that among those affected within a given society, gains are to be distributed equally, unless inequality admits of special justification which is reasonably acceptable to all of them. But what are the moral grounds for claiming that inequality of gain requires special justification? If everyone is made substantially better off, who could reasonably complain?

James suggests that the nature of the good created in the trade relationship is relevant. This good is national-level gains across an economy, to which people contribute simply by promoting their personal economic interests. No general class of market actors makes any special contribution to the gains of trade for society overall which would give them any proprietary claim to the gains (ibid., 26f). The default distribution then according to James, which recognizes every participant's claim equally, is equality of gains, unless further reasons for a difference in treatment can be given. In this sense James opposes a libertarian view of property rights and subscribes to a Rawlsian one that understands them as what one gets in a fair scheme of cooperation (ibid., 27). Above that, James argues that a change in trade policy is not an intervention into any given transaction, but a change in the background conditions of exchange (especially relative scarcity of goods). Accordingly, redistribution of the gains of international trade is thus not analogous to the former case. "The more closely analogous situation is that in which a government deposits money into one's bank account and reserves a right of fairness to give notice and take some of it back" (ibid.).

The domestic distribution of the gains of international trade, according to James, bears on what is fair in the *international* system, in that a country's inegalitarian policies can affect the relative gains of other countries and their members. Assuming that fairness asks for developing countries to get special privileges in the trade system on grounds of poverty (despite significant costs to rich countries), this argument will be considerably weakened if the rich in those developing countries gain to a degree which is not necessary to maximize prospects for the worst off. "Even if we suppose that everyone in a developing country is made better off, the level of relative gain will matter. Rich countries can reasonably expect limitations on inequality of gain, so that gains flow as much as possible to relatively poor people. It won't be fair to ask rich countries, including their own worst off, to pay for unnecessary gains to relatively rich people" (ibid., 28).

How does James argue that gains across trade societies are to be assessed? According to International Relative Gains, the default is equality of gain. But he claims that there are two important exceptions. First, gains are to be adjusted (by approximation) according to relevant endowments such as a country's population size, level of development, and any other factor not created by the trade relation, which predictably change how much a country gains from global

market integration. This endowment- sensitivity is supposed to reflect international trade's limited aim, which is to *improve* upon endowments. "Trade is legitimate and fair as long as the associated practice of market reliance is mutually beneficial and the improvements it creates are distributed in a reasonably acceptable way" (ibid., 29).

Second, James argues that inequality of gain is fair if greater benefits flow to people who are worse off in absolute terms. The principle thus reflects a limited form of "priority for the worse off," as applied to levels of gain among trade partners. The idea, in general, is that benefits matter more, from a fairness point of view, the worse off those people are in absolute terms (ibid., 29f).

In what follows I want to take a critical stance towards James compensation view.⁸⁴ In fact, it seems that it is faced with some relevant problems. One is that it has – without amendments – quite counterintuitive implications. First, it would require that very well-off people who lose out because of trade liberalization – for example an oligarch whose monopoly is undermined by new foreign competition – be compensated for their loss. James wants to avoid this counterintuitive outcome by claiming that compensation for the burdens of freer trade should be restricted to the worse-off in society, while those who remain well-off and secure after losing out because of freer trade don't have a claim to compensation. He claims that 'The fact that the relatively less well-off bear the chief burden of a society's enjoying the gains of trade gives them an especially weighty claim to greater shares [of the gains from trade]' (James 2009, 25-6). It is unclear though how this can be justified on the basis of an understanding of fairness as sharing the burdens and benefits equally.

Second, the compensation view raises the question why free *international* trade should trigger the fairness standard of sharing burdens and benefits inside a country (compensating the losers from the gains of the winners), whereas free *domestic* trade doesn't. In other words, why should those people who lose out economically because of international trade be privileged (by getting special compensation) over those who lose out economically for some other reason – for example because of technical progress or domestic competition? Why, for example, should a milk producing farmer who loses business because of international competition be privileged by getting special compensation over a restaurant owner who loses business because of new competition in the neighborhood? Why should a worker who loses his job because of foreign competition be privileged over one that loses his work due to technical progress? What morally relevant difference could there be from the perspective of a country between international trade and domestic economic developments that would justify applying the fairness standard of sharing burdens and benefits to international trade but not to domestic trade?

It seems that to justify this one has to take the situation of national autarky as one's moral starting point. Assuming that economic autarky is a morally favorable state and a sensible baseline to compare alternative states with, it could be argued that an autarkic country considering opening

⁸⁴ The following section profited substantially from the reflections of Brandi 2011.

up its borders for trade should only do so when this leads to an outcome where domestically many end up better and no one ends up worse-off than before. The reason for this, it could be argued, is that leaving some worse off while others benefit of the change would be unfair, since this would amount to an unequal distribution of the burdens and benefits of the change. Since free trade is supposed to be Kaldor-Hicks efficient over autarky, meaning that such an outcome can hypothetically be reached by compensating the losers from the winners, it is to be considered morally favorable, but only if the said compensation is actually carried out.

The reference to an autarky baseline is found, among others, in Aaron James. He suggests that what matters from the perspective of fairness is that no person's life prospects are worse than they would have been had his or her society of origin been closed to trade – more precisely, if it would have chosen economic autarky around the date of the person's birth (James 2009, 19-20). If the person's expected life prospects would have been better under autarky, then he or she is made worse-off by life in an open society, and is to be considered a "loser" from international trade of the sort who can claim compensation on the grounds of fairness.

I take it that James doesn't sufficiently justify his choice of the autarky baseline. Such a justification would be especially called for since the autarky baseline seems problematic for several reasons. First, it is clearly a purely hypothetical baseline that has nothing to do with the actual states countries which deal with trade liberalization are in. Economic interdependence has been the reality for many centuries, even millennia, so that this baseline is certainly not realistic with regard to the actual situation. Accordingly we have to consider if there are good reasons in favor of a *hypothetical* normative autarky baseline.

In philosophy, hypothetical situations (such as economic autarky) are usually imagined as part of a thought experiment, which serves to derive general normative conclusions. What is important for those conclusions to be applicable to reality is that the hypothetical situation and the real situation are comparable with regard to the normatively relevant aspects.

An example that illustrates this and is also directly relevant for the topic of autarky is Rawls' original position. In this hypothetical situation, we remember, people decide on principles of justice behind a veil of ignorance which is designed to grant impartial results. These resulting principles of justice are then thought to apply also in reality. Now, interestingly for our case, for the sake of simplicity Rawls' assumes his society to be autarkic, and includes reflections on international trade and interaction only after the principles of internal justice have been fixed. A reason for this is Rawls' contractualist approach: he conceives of morality as being concerned with what a group of rational people would hypothetically mutually agree on – in the sense of a hypothetical contract between them (hence "contractualism"). Accordingly, the interests of all the parties to the contract must be figured into the agreement. But for this to be possible it is obviously crucial to know *who the parties to the contract* are. Rawls decided that the parties to the just social contract he was working out were

the *citizens* of the country in question – and only them. To make this unproblematic he imagined his society to be autarkic.

In the debates on Rawls' ToJ this has been reason for some criticism, since it is contended that the hypothetical situation abstracts from normatively relevant traits of the real situation, which makes the application of the normative results to reality unfeasible. Concretely, by hypothetically imagining the society as autarkic the potentially normatively relevant implications of cross-border trade and interaction get lost in the abstraction. Through international trade, so the argument, foreigners are closely connected to the citizens of a country and crucially contribute to the generation of wealth inside that country, which seems to be a morally relevant difference to the autarky scenario. These connections make it problematic to completely exclude the interests of foreigners from reflections on justice by excluding them from being party to the hypothetical contract. Choosing autarky as the context of the hypothetical contract in the ToJ therefore leads to an unjustified exclusion of the interests of foreigners connected to the society in question through trade and other interactions.

Besides this problem, autarky is very clearly not an economically favorable state. There is empirical evidence on the costs of autarky to societies. Irwin (2001) e.g. assesses a trade embargo, which provides a rare opportunity – a natural experiment – to observe the effects of a nearly complete (although short-lived) elimination of international trade. The paper shows that the embargo inflicted substantial costs on the US economy while it was in effect.

In fact, it seems to me that there is no convincing argument for James' claim that the fairness standard of sharing burdens and benefits equally should be triggered by international trade but not by domestic trade. Instead it seems more plausible that all economic burdens be domestically treated in the same way. Since burdens created by the domestic economy are usually handled within an encompassing safety net funded by redistribution, it seems plausible to domestically handle burdens resulting from international trade in the same way.

This is the position that Brandi (2011) argues for: in this sense, losers from international trade "should be compensated to the extent that this is required from the perspective of a more general principle of social justice – say, the difference principle – rather than from the perspective of a narrower principle of fairness in trade that the Compensation View proposes" (Brandi 2011, 3). This is what usually happens within affluent countries today. Nevertheless, the quality and extent of the social security net differs widely across different countries. Recognizing that those who lose out from economic competition, within and across countries, are the unavoidable "by-product" of the free market system, which is chosen because it is (allegedly), all in all, good for the country as a whole, provides a general argument for providing a strong social security net. This however does not follow from an argument of fairness as sharing the burdens and benefits of trade, but rather from a

more general argument for an ideal of social justice which “requires that the *overall* distribution of benefits and burdens in society is just, rather than the distribution of those specific benefits and burdens that are generated on the basis of international trade” (ibid., 2).

5.3 Conclusions on Fair Trade on the Level of the World Trade System

Let me summarize the findings of our examination of the moral bases of positions on fair trade on the level of the world trading system. The first position we considered understands fair trade as free trade. This position can be understood as being based on general moral fairness and accordingly as stating that free trade is morally desirable. It is a position on *just trade* in my terminology since it concerns the background conditions and outcomes of the whole trading system. Arguments for this view are made on grounds of liberty, desert, and welfare. The argument on grounds of liberty is based on the prohibition of coercion and is plausible and strong. The argument on grounds of desert for the moral desirability of the market is implausible. The arguments on grounds of welfare as based on the efficiency of the free market are highly important for debates on fair trade but are dependent on actual markets’ proximity to the ideal market of the theory. When operating with an understanding of fair trade as free trade, where actual markets are too far from the ideal market this requires corrective action, which is an important aim of the social Fair Trade movement. However, the Fair Trade movement is criticized with regard to the floor price they pay for commodities, which might lead to inefficiency if the trade volumes become higher. This might be negative for the development of the relevant countries, which in turn could be considered unfair in the sense of unethical.

We then turned to consider the position that understands fair trade as trade leading to the development of the globally worst off. This is a position on *just trade* in my terminology as well, the moral base of which can be understood among others in the sense of Rawls’ difference principle or a sufficientarian position. As we saw in Part I, the application of principles of justice to the global realm depends on a one taking a non-nationalist position in the Global Justice debate, and especially the application of the Difference principle is highly controversial in that respect.

In a next step we turned to positions that understand fair trade as being trade on terms that ensure reciprocity and impartiality. In my terminology, these positions concern *fair trade* proper. Based on my understanding of fairness I argued that they must be qualified so as to take disadvantages in the background conditions into account. This offers an argument against protectionism by industrialized countries but allows protectionism by developing countries in the case where this is presumably necessary to let them “catch up” economically.

We then considered the position that fair trade is trade on a level playing field, and that this requires a harmonization of standards. In my terminology, this position concerns *fair trade* proper. I argued that on the base of my understanding of fairness this claim is not plausible as a fairness claim because it would disadvantage developing country producers even further. To avoid this, the latter

would have to be supported in the transition to the high standards. However, the requirement for harmonized *high* ecological and social standards can plausibly be understood as a claim of *ethical trade*, in the sense of leading to morally better trade results (less environmental degradation etc., see chapter 3.9).

Finally we turned to the position that understands fair trade as requiring that trading nations distribute costs and gains from trade “fairly”. This position is based on fairness proper in the sense of the outcome related fairness standard of sharing burdens and benefits in a fair way. The latter is understood here in the sense of not being reasonably rejectable. The position depends on us understanding global trade as a case of cooperation. I argued that although James’ approach is highly interesting, it is faced with some weighty problems, the most important one being that it is unclear why losers from international trade should be compensated whereas losers of domestic trade are not.

6. Fair Trade on the Level of Trade Policies of States

A fair, just or ethical trade policy specifies the ways in which a state should relate to other states and their inhabitants with regard to trade related issues, through bilateral agreements, regional agreements, and the WTO's multilateral institutions. Of course this question is linked to the question from the previous chapter: what fairness demands regarding the trade policy of a country bears heavily on what fairness demands with regard to the world trade system, which is substantially constituted by countries.

As central “fairness” issue with respect to countries’ trade policies concerns the question of protectionist measures, that is, measures which aim at protecting domestic producers from foreign competition. While we have discussed some “fairness” issues with regard to them on the level of the world trading system already, in this chapter I will at this issue *from the perspective of individual countries*.

As we saw before, with regard to the question of protectionism, the concept of “fairness” is used in contradictory ways. In the US for example, “fairness” has been used to argue *for* import protection to save jobs in low-wage industries in the US, while it has also been used to argue *against* import barriers in Japan which are claimed to unfairly restrict access to US exports. This is of course inconsistent, since what is claimed in the name of “fairness” in this case obviously only takes one’s *own* country’s perspective into account, while not acknowledging that for matters of consistency, the same claims would apply from the *other* country’s perspective as well.

6.1 Position (g) Fair Trade Policy Balances the Stringent Claims of Citizens and Foreigners Proportionally

In their influential papers “Fairness in trade I: obligations from trading and the Pauper-Labour Argument” (Risse 2007) and “Fairness in trade II: export subsidies and the Fair Trade movement” (Risse / Kurjanska 2008), Mathias Risse and Malgorzata Kurjanska discuss what fairness demands with regard to the trade policy of states. Their claim is that trade policy is fair if it balances the stringent claims of all affected parties proportionally. Formulated in our standard form, the position can be spelled out as the claim that “trade policy is fair if it balances the legitimate claims of citizens and foreigners in a fair way”. Their understanding of fairness is based on that of Broome (see chapter 4.2) and accordingly the normative assessment of this position focuses on the outcome dimension of trade.

Understood in Risse and Kurjanska’s sense, the question of what a fair trade policy amounts to should be understood as the question which actors have which stringent claims towards the government of a country in the realm of trade policy. In my terminology this is a position on *just trade* since it judges this question from the perspective of different views on global distributive justice. The subject of the claim’s presumed moral duties to ensure fair trade are countries. The according duties ask of them to ensure that their trade policy proportionally balances the stringent claims of citizens and foreigners.

The basic argument for the claim that “trade is fair if it balances the stringent claims of citizens and foreigners proportionally” can be understood as follows:

(P1) Trade is fair if trade policy is fair

(P2) Trade policy is fair if it balances the stringent claims of citizens and foreigners proportionally

(C) Trade is fair if it balances the stringent claims of citizens and foreigners proportionally

Regarding (P1), there is obviously a tension between the fairness of trade, which is *international* trade, and the fairness of trade policy, which is *national*. Note therefore at the outset that if international trade is a practice that implies fairness requirements of its own, then we cannot reduce the fairness of international trade to the fairness of the trading policy of states as (P1) suggests. Rather, it is possible that fairness requirements of international trade make demand of countries that are in conflict with internal demands of justice. We will come back to this later.

Regarding (P2), the crucial point is obviously the distinction between a countries’ own citizens and non- citizens. The central question with regard to this position is accordingly what stringent claims citizens and foreigners have in this context, and how they should be compared. Do only the former have stringent claims on a government regarding its trade policy? Or do also non-citizens who are afflicted by a country’s trade policy have claims towards the government? If both citizens and non-citizens are considered to have claims, which claims are they exactly, and how are the claims of the former to be compared with the claims of the latter?

A second distinction in this respect is the one between producers and consumers, since they

often have conflicting interests. Does the government have a primary duty to producers or consumers, and, in both cases, to which sub-group (different producing industries and poor, middle class, and wealthy consumers)?

How we answer these questions about the demands of on the trade policies of countries depends (among others) on the position one takes in the nationalist – cosmopolitan debate introduced in chapter 3.7.2). Very roughly speaking, nationalists assume that a country's own citizens have exclusive or at least significantly stronger claims on their government as foreign citizens, and accordingly often argue that justice or fairness as comparative equality requires their government to protect them through their trade policy against foreign competition. We encountered this position, which Risse calls the “strong Westphalien view” before. The moral basis of this argument can rest on the different grounds that were presented in chapter 3.7.2 (e.g. communitarian grounds, or the concept of a social contract which that citizens have with each other which requires them to support each other, but not outsiders).

So, let us examine how Risse and Kurjaska/Risse approach and answer these questions in their two papers.

Risse and Kurjanska develop their position regarding fair trade policies of states from a broadly nationalist perspective. At the outset Risse emphasizes that his reflections start from the assumption that states are in principle legitimate, thereby asserting state sovereignty as a relevant principle for the moral assessment of the trade policies of countries. But as Risse argues, giving some moral weight to state sovereignty does not as a matter of principle “immunize a country against practically relevant moral criticisms of its trade policies” (Risse 2007, 356). Rather, it entails that “State sovereignty ... must be understood as one relevant *pro tanto* consideration that must be balanced against competing moral claims” (ibid.). Put differently, according to Risse “principles of fairness, to the extent that they apply to trade, are constrained by the [general] legitimacy of states” (ibid., FN 5; Risse 2005). As he stresses, investigating the topic of fairness in trade from this starting point leads to very different results from those obtained when starting from another assumption (e.g. a cosmopolitan one).

As mentioned, Risse takes the perspective that fairness in trade policy is to be understood as “proportional fulfilment of stringent claims” on grounds of deontological claim bases. His goal is accordingly to assess how stringent claims regarding trade that arise on different bases should be compared. From this starting point he sees three concrete fairness questions raised by international trade with regard to the trade policy of a country (B): First, in the case of A trade with B while parts of A's population are oppressed, do the oppressed in A have a complaint of fairness against B, and should B cease to trade? Second, in the case of A trade with B and A's products being cheaper because of oppression or lower social standards in A, do the affected industries in B have a legitimate claim of fairness that their government take measures to help them compete? Third, in the case of B subsidizing certain industries which leads to lower world market prices, does A have a fairness

complaint against B? (Risse 2007, 356) In his two papers, Risse develops affirmative answers to all three questions.

Risse's methodology is to start from the *Strong Westphalian View* of people's claims regarding trade policy and investigate if it can be justified on moral grounds. When his argumentation leads him to conclude that it *cannot*, he adjusts it to a weaker view with regard to the weight of state sovereignty, the *Moderate Westphalian View*, which he again subjects to critical examination. He concludes that it too has to be adjusted on moral grounds to his final position, the *Weak Westphalian View*. His analysis is divided into arguments for the transitions between these different views of what are the relevant claims.

Let's look at his arguments in some detail, with special focus on their moral grounds and their relation to concepts of fairness and justice.

Risse justifies his nationalist starting point by arguing that economic fairness applies differently within and across states because domestic markets, contrary to the global market, are embedded in the context of a shared legal corpus – particularly property law – that must be justifiable to all those that are subject to it. In this sense, especially the scope of property exchanges subject to markets, and the methods of market regulation specified by property law must be justifiable to individuals *qua free and equal citizens in a system of cooperation*, “and is subject to an evaluation in terms of fairness in this sense” (ibid., 359). In other words, the moral claim base of citizens regarding market regulations is accordingly the claim that they must be *justifiable to them qua free and equal members of a system of cooperation* (in the Rawlsian sense) (ibid.). Conversely, Risse argues, fairness considerations don't apply in the same way across state borders, by which he means that people elsewhere affected by the distribution of trade related benefits and burdens have claims towards other states on different bases.

Let us turn to Risse's description of the *Strong Westphalian View* (SWV), which he takes as his starting point since it reflects the realities of the state system and underwrites much of the relevant international law and social science literature (ibid.). Risse describes this view in the following way: “Trade policy is every country's own and exclusive affair. As long as the production processes themselves do not harm other countries, the social costs of production and the prices of goods from a country should not be subject to external interference, unless such production involves atrocious activities such as slavery. The world market prices of goods from other countries must be accepted in much the same way in which climatic conditions must be accepted: their change cannot be demanded as a requirement of fairness, nor do such prices by themselves give individuals *elsewhere* claims in fairness to governmental protection such as subsidies. Different countries do not stand in a relationship to each other that allows for fairness considerations to arise: they do not owe each other anything as far as the determination of prices is concerned, nor do governments owe anything to their own citizens based merely on what social costs are elsewhere”

(ibid., 360f).

Risse goes on to argue why he believes this view is not morally justified, centering his arguments on *oppression* in certain trade countries, oppression being defined as implying violations of negative human rights (mainly physical inviolability). His first argument is that the SWV fails to capture legitimate claims of those who are oppressed against their trade partners. The moral grounds of this argument are that trade has distributive effects within a country, which are only “acceptable if they are if guided by a process justifiable to all, including those who lose out” (ibid.). In countries where part of the population is oppressed, this is not given. In a situation where country “A is, on an ongoing basis, involved in trade with B, an activity from which both sides benefit, while representatives of B can reasonably be expected to know that parts of the population in A are oppressed and the gains from trade occur at this subset’s expense” (ibid.), trade partner should be seen as being *involved* in the oppression, which “gives the oppressed a complaint in fairness against a trade partner. Such trade is like ongoing trade with stolen goods” (ibid.). In short, the moral grounds of Risse’s claim are that trade partners should be seen as benefitting from wrongdoing (and possibly contributing to it), against which the oppressed have a stringent claim which outweighs the claim of the former to their benefits. According to Risse’s understanding of fairness, this gives the latter a claim of fairness against the former’s engagement in trade with their country, which requires the latter, *prima facie*, to suspend trade with the oppressive country. That the SWV does not accept these claims of the oppressed is a reason to abandon it.

Nevertheless, and independent of the SWV, Risse goes on to argue, the former do not have a moral obligation to do so if sufficiently strong consequentialist reasons speak against this. In this case, “fairness” reasons are outweighed by the consequentialist reasons. Given that trade leads to growth, which is strongly supported by the evidence, and given that growth is beneficial for realizing goals that benefit the oppressed (like the UNDG), which is more controversial and conditional on certain factors, these beneficial consequences may (via deontological aggregation) outweigh current unfairness, if sufficient measures are taken to ensure they will come about (ibid., 364).

Let’s look more closely at the moral grounds of Risse’s understanding of fair trade which underlies the above argumentation. Fair trade in this sense is understood as trade which does not involve violations of the human rights of the trade partners. This is a recurring view in debates about fair trade. How convincing is this understanding of fair trade?

A first problem is that this understanding of fair trade does not cover some instances specific to trade which are often considered unfair although no oppression is involved. Such are cases where trade leaves one party very badly off, or where farmers are offered commodity prices that are too low to enable their adequate subsistence.

A second problem is that this view is not specifically about *trade*. Rather, it applies *whenever* there is interaction between a party and a country where there are wide-spread human rights violations from which the first party benefits in some way. The same would apply in the

case of tourists, for example, who in Risse's sense might become complicit in supporting oppressive regimes by giving the governments of such regimes access to hard currency. Since this problem then is not internal to the practice of trade itself, it seems more accurate to consider it a problem of the *general ethics of trade* (cf. Miller 2010, 14).

6.2 The Main Ethical Arguments For and Against Protectionist Measures from the Perspective of States' Trade Policy

In arguing against the SWV, Risse offers a second argument, which is based on the so-called *pauper-labor argument (PLA)*. The latter, which we have encountered before, claims that “Foreign competition is unfair and hurts other countries if it is based on low wages” (Krugman/Obstfeld 2003). Krugman/Obstfeld argue against PLA that countries trade precisely *because* production costs differ, so this certainly cannot be seen as unfair trade. Risse interprets this view as being implicitly based on the SWV, implying that how other countries (B) determine social costs and treat their workers is none of their trade partners’ (A) business, and workers in A cannot complain on such grounds that they are being treated unfairly (Risse 2007, 366). Risse goes on to analyze the moral grounds of the latter view against its opposite, PLA, to answer the question if domestic workers have a fairness claim to compensation if they are harmed because of oppression or less stringent legislation abroad (‘social dumping’) (ibid.).

As Risse rightly points out, a supportive argument cannot merely be that continuing to trade with nations where workers are oppressed or social standards are bad *harms* some people domestically, since *any* policy harms some people relative to a suitable baseline. Accordingly, a reason is needed as to why *this specific harm* is unacceptable (ibid.).

Risse argues that this reason is given on grounds of consistency insofar as domestic workers are disadvantaged because social standards have been accepted in their society *for moral reasons*, while foreign competition benefits from disregarding those standards and reasons (ibid., 367). The argument is conditional: “*if* legislation of social standards rests on moral reasons, *then* consistency considerations (considerations exploring what is entailed by the fact that standards hold for moral reasons) deliver the conclusion that domestic industries may deserve compensation” (ibid.) (“compensation” meaning shifting the burden from one industry to all taxpayers). The idea is that if the *society as a whole* decided to adopt social standards for moral reasons, then it should support industries that are suffering losses because they, contrary to others abroad, have to abide by those collectively set moral standards. Conversely, if social standards domestically have emerged from power struggles, there is no such collective moral decision to ground a collective responsibility for the negative effects on some domestic industries, and no corresponding fairness claim to compensation on their part.

Again, Risse argues that these fairness reasons might be overruled by consequentialist reasons, on the grounds of the huge benefits of trade. In this vein it could be argued that trade with these countries should be sustained and the industries that loose out because they have to abide by higher social standards should be compensated from a part of the surplus generated by trade (ibid., 368). In any case, the SWV cannot account for this claim. Together with the last argument this suggests that the SWV should be adjusted so as to be able to accommodate the claims discussed.

On these bases, Risse proposes the adjusted *Moderate Westphalian View (MWV)*, which holds that while it is up to each country to determine the social costs of production, the production processes themselves must not harm other countries, and the effects of trade must be distributed in such a way that no negative rights are violated: “Violations of this latter condition give rise to claims in fairness to trade partners by those who lose out in the process, and constitute *pro tanto* reasons to suspend or restrict trade. (...) Changes of world market prices of goods from other countries that have been determined without the violation of negative rights cannot be demanded as a requirement of fairness. Still, prices of goods from other countries may, under certain conditions, give individuals claims in fairness to protection by their government, namely, if they negatively affect these individuals’ interests and have arisen in ways that are at odds with domestic social standards. However, these claims to protection have to be weighed against competing economic interests in free trade and thus may also not be conclusive” (ibid. 369).

To assess if the MWV is a plausible moral perspective on the trade policies of countries, Risse proposes to imagine a world where no countries violate negative rights and all have reasonably similar social systems (incorporating the adjustments in MWV), and ask if the SWV would encompass all morally relevant claims in this scenario. Risse argues that there remains the question if other countries B have fairness complaints if they are harmed because A protects its producers – in other words, if *protectionism* is to be considered fair, all relevant claims considered (ibid., 369). In terms of trade policy, this translates to the question whether governments have the prerogative or duty to protect their citizens’ commercial interests via protectionist measures, even if this makes others worse off.

First, such arguments can be based on *normative claims by producers*. Farmers in *developed* countries can be argued to have claims against *their fellow citizens*, which put the obligation on the latter to accept redistributive measures to keep the farmers in business. Second, and independently of the first line of argument, such arguments can be based on the claim that *countries* have the *prerogative* to take measures for keeping producers in business, on the basis that they value their products for their social (or environmental) traits.

To judge what fairness (in Risse’s sense) demands, the claims presented in the two lines of argument above have to be weighed against competing claims. This weighing of claims is complicated by the fact that different groups (producers and consumers) in both developed and developing countries have *opposing* interests, and possibly claims, in this context. Which then are the relevant claims in the case of subsidies?

In the former case, claims on behalf of farmers in developed countries must be weighed against claims of developing country producers to participation and chances for success in the global market (which subsidies compromise). Second, domestic consumers might have a claim against subsidies because they raise domestic prices (since more is exported due to the subsidies, and there

are fewer goods on the domestic market which raises prices, and they are often paired with import restrictions that further drive up prices.) Third, consumers in countries which are net importers of the goods in question (possibly in some cases the same countries where producers are disadvantaged by the subsidies) might have a claim to the subsidies since they *benefit* from them. Additionally (Kurjanska and Risse don't discuss this), since efficiency arguments and consequentialist arguments clearly give general reasons against subsidies, it might be argued that *future* inhabitants of developed countries have a claim to benefits from a competitive economy (which is jeopardized by subsidies).

First, let's turn to Kurjanska and Risse's discussion of the moral grounds of claims for subsidies against their fellow citizens. They assume a Rawlsian liberal-egalitarian framework, where individuals have a claim to governmental services in the sense of a realization of the principles of justice (see Part I). These principles are much more abstract than a claim to subsidies. While the former presumably entail claims to basic economic protection (which can take the form of unemployment benefits, assistance with retraining to enter a different line of work, etc.), the latter is "a very specific claim to continue in a chosen line of work although granting the claim is detrimental to the economy" (ibid., 36). "For claims to subsidies to succeed, individuals must argue that the government can be liable for their choice of occupation (and for the consequences of this choice turning out to be unfortunate) as well as that they are entitled to *this specific* form of retribution" (ibid.). On what moral grounds could this rather implausible seeming argument succeed?

Kurjanska and Risse argue that different versions of capitalism "are characterized by institutional complementarities: one set of institutions operates effectively only (or more effectively) if accompanied by other institutions. This especially applies to ownership arrangements and labor markets" (ibid.) A relevant example for our case are "coordinated" market economies (e.g. Germany), which have "rigid labor markets that encourage employees to invest heavily in specialized skills and reward them with job security" (ibid.). In such economies, workers, who specialized because legislation made it irrational for them not to, may claim that the state is responsible for their inability to find new work if their economic sector should collapse. In other words, by taking an active role in promoting specialization, the government can be seen as an active player in its citizens' professional decisions, and accordingly the risk that accompanies specialization seems justifiable to citizens only if the state offers guarantees for the case that they fail (ibid.). Accordingly, Risse argues, highly specialized individuals might have a claim to assistance, which can take different forms, subsidies being only one of them (ibid., 37f).

In liberal market economies on the other hand, people can choose if they want to specialize or not, taking on the risks that go with each option, because the system is prepared to deal with workers who lack specialization and may need additional training. This also makes switching sectors easier for people who have specialized and failed (ibid.) Hence, it seems that there are no moral bases for a claim to special assistance to continue their line of work (ibid., 37f).

Kurjanska and Risse then turn to the second line of argument for subsidies, which they call the *collective preference-based argument* for subsidies. It states that the citizens of a country “might simply have a collective preference for home-grown products, be willing to pay the price for them, and assert that they are entitled to such indulgence. Similarly, they may simply prefer to buy local products to minimize the environmental harm caused by long-distance transportation, thus disagreeing with the market’s summation of the costs of production” (ibid., 39). The moral grounds of this argument can be understood as stating that it is a country’s freedom to disagree with the market about the costs or benefits of certain products, be it in the form of placing a higher value on products made at home, or by thinking that the market fails to consider the costs of producing products elsewhere (e.g. the environmental costs) (ibid., 38).

As Kurjanska and Risse rightly argue, both this and the last argument cannot be sustained if one assumes that one or both of the following conditions apply: 1) developed countries have minimal duties towards developing countries (moral claim), and/or 2) trade plays a crucial role for growth as well as for other desirable goals of development (like the UN Millennium Goals) (empirical claim).

We have considered the latter claim already and have found that empirical research suggests that trade does indeed play a crucial role for growth, and that under certain institutional conditions growth is indeed beneficial for the realization of other goals. *To the extent* that this is true, assumption 2) holds true. 1) also seems difficult to oppose on moral ground (although it can of course be done). Moral grounds for minimal duties of developed countries and their citizens toward people in developing countries⁸⁵ could be for example that existing grave needs put a responsibility on those who can meet them to do so; or that in a global, Rawlsian Original Position behind the veil of ignorance such duties would be acknowledged, etc. (cf. ibid). In the language of claims, it seems plausible to assume that the global poor have a claim to assistance of some sort from developing countries. Given that trade is crucial for assistance, when weighing this claim with the one on behalf of producers to stay in their line of work, we might conclude that the former claim is stronger than the latter. Accordingly, the above argument would seem to be convincing, which means that it makes “an overwhelming case for helping developing countries to join world markets” (ibid.). Abolishing subsidies would therefore seem to be required by “fairness” in Risse’s sense, or general morality in mine.

But on the bases of Risse’s understanding of “fairness”, it is *only to the extent* that free trade matters for growth and other goals in developing countries that subsidies pose a moral problem of fairness (again, in Risse’s sense), so the argument crucially depends on this empirical question. There is much controversy about how important trade and liberalization are *compared to other factors* and thus about how much priority should be put on reducing trade barriers, rather than, for example, focus on the domestic reform of institutions in developing countries (ibid., 39f).

⁸⁵ For an in depth discussion of this question see e.g. Bleisch 2010.

“The ongoing nature of this dispute makes it hard to reach a bottom-line judgment about subsidies. We saw that, in coordinated market economies, individuals do have some claim to support from the government if their line of work fails. However, we also saw that it depends on the presence of competing claims whether this claim takes on the shape of subsidies. One competing claim is that if subsidies are trade distorting and other forms of support are not, then proportionate consideration of different claims requires that citizens be helped in minimally trade-distorting ways. The need to avoid trade-distorting measures and the case for the moral urgency of the termination of subsidies depend on the debate about the importance of trade for development” (ibid., 40).

Kurjanska and Risse argue that the above considerations on duties to the distant poor and their relevance for the legitimacy of subsidies require us to adjust the MWV into a final, plausible moral position from which to assess the “fairness” of trade policies of countries. As such a position he proposes the *Weak Westphalian View*, which integrates these duties: *Weak Westphalian View*: “Every country’s trade policy is subject to constraints in fairness that limit how it can determine the social costs of production. First, the production processes themselves must not harm other countries. Second, the effects of trade must be distributed in such a way that no negative rights are violated. Violations of this condition on the distribution give rise to claims in fairness by those who lose out in the process to trade partners. They constitute *pro tanto* reasons to suspend or restrict trade and conceivably also for interference through non-trade-related measures by the trade partners; however, it is a separate question whether these reasons are conclusive. Third, world market prices of goods from other countries may, under certain conditions, give individuals claims in fairness to protection by their government. This would occur if such prices negatively affect these individuals’ interests and if they have arisen in ways that are at odds with domestic social standards. However, these claims to protection would have to be weighed against competing economic interests in free trade and may not be conclusive either. Fourth, trade policies must be devised in such a way as to be consistent with duties to poor countries. Therefore, countries have *pro tanto* reasons to determine prices in such a way that they take into account their effects on third parties” (ibid., 42).

With regard to the perspective of ethical trade policy of countries, I follow Kurjanska and Risse here. It is important to note that the efficiency problem stays the same as in the last case though. This suggests that even from a nationalist perspective, it might be advisable to try and fulfil what is seen as the claims of a country’s own citizens by resorting to compensatory or social security measures rather than protectionist ones. As our reflections in chapter 4 suggest, from the perspective of fairness as we understand it this seems demanded as well.

Let me mention one last argument in favor of protectionist measures, which concerns a particular sector which elicits the most controversy in practice: protection of the agricultural sector in developed countries. This argument is based on food security. While I cannot do it justice here for

reasons of scope, let me nevertheless say a few things about it. Note that this argument, just as the ones discussed by Kurjanska and Risse, is not based on considerations of fairness and accordingly is not about *fair* trade policy, but is rather based on general moral considerations and should accordingly be considered an argument about *ethical* trade policy.

The argument from food security for the protection of the agricultural sector rests on the recognition that food is absolutely indispensable for maintaining human life and crucial as a basis for a healthy and fulfilled life. Therefore, in the words of e.g. the Japanese Basic Law on Food, Agriculture and rural Areas, it is a primary obligation of the government of each country that “a stable supply of good-quality food at reasonable prices shall be secured” (MAFF 1999, cf. Taka 2010, 149). And further: “in consideration of the fact that there are certain unstable factors in the world food trade and supply/demand, this stable food supply to the people shall be secured” (ibid.) by means of ensuring continuous domestic production of basic foods. If this requires subsidies or other protectionist measures, this is seen as a necessary means to the stated morally highly important aim of ensuring the food security of a country’s population.

I consider this argument to be convincing. It is strongest where there is a large population who does not rely on subsistence farming and has little economic reserves, and is accordingly dependent on affordable food prices for their survival. The most vulnerable group in this respect is the urban poor, and accordingly the argument is presumably strongest with regard to countries with a high number of urban poor (such as slum inhabitants) – which encompasses mostly developing countries. In their case, even short term raises in food prices have dramatic consequences. However, even regarding developed countries the argument is presumably relevant in a precautionary sense with regard to times of deep international crisis – either in terms of economic break down or war. I am accordingly inclined to accept the argument in a qualified form even for developed countries. However, note that the plausibility of the argument is strictly limited to the basic food production necessary to sustain a country’s population whereas it does *not* give a reason for accepting *export* subsidies on basic foods as ethically justifiable.

6.3 Conclusions on Fair Trade on the Level of Trade Policy of States

Our discussions on the level of trade policy of countries have been mainly concerned with the ethical assessment of protectionist measures and have mainly followed along the lines of Risse and Kurjanska’s reflections on the topic. From the perspective of *ethical trade* policy in our terminology and assuming their broadly nationalist starting point is plausible, we agreed with most of their reflections. However, if one takes a cosmopolitan perspective on the Global Justice debate, their arguments are obviously not plausible.

In any case, as I see it, Risse’s use of the concept of fairness is not plausible. The concept’s

moral underpinnings don't lend themselves to justifying partiality the way he uses it. From the perspective of fairness as I understand it, the question poses itself in a different way: from the perspective of fairness as qualified impartiality, protection is only justifiable when it counteracts a disadvantage in the background conditions that stands in the way of participation on equal terms in the practice of global trade – that is, in case of developing countries with underdeveloped industries.

It should be added that when generalized, any argument for protectionist measures leads to a situation where it would seem just from the perspective of *all* countries to protect their own workers, resulting in world dominated by economic protectionism. This is not a desirable situation with regard to efficiency and its presumed well-fare gains at all. In fact, it could in principle well lead to everybody being worse off than they would otherwise be. Paradoxically, under certain circumstances it might enhance the chances of food security becoming a salient problem. Both from the perspective of fairness and from the perspective of efficiency and its moral relevance for well-being, it is therefore certainly morally required to restrict protectionist measures with the above aim as far as possible, and solve the problems they aim to solve in other ways.

7. “Fair trade” on the Level of the Global Supply Chains of Multinational Companies

7.1 The Background

In this chapter we are concerned with fair trade on the level of the global supply chains of multinational companies (MNEs). In this context it is often claimed that MNEs are guilty of unfair or unethical trade if the workers in their supply chains, who produce the products the MNEs sells, are subject to bad working conditions and earn below-subsistence wages. In the following I will discuss such charges of unfair trade directed at MNEs, analyze their moral grounds and assess their plausibility.

Let us start with the concept of “supply chains” (or “value chains”). The notion refers to all activities that are necessary to bring a product from its designing, the extraction of raw materials through the different stages of production, storage and distribution to the consumer.⁸⁶ Firms where all or most of these steps happen *within* one and the same company are called “vertically integrated”, referring to them being integrated under “one roof” and having a clear hierarchical structure from top to bottom. Until the early 1980ies this was the prevalent form of organization even of large multinational companies.

But in the early 1980ies, a fundamental shift occurred in the focus and organizational structure of many big northern companies. A new business model gained prevalence which focused on *product development* and *brand management* as the company's “core competencies”, whereas the

⁸⁶ Some authors also include the stages after the use of the product, namely those when it becomes waste, including thus the whole life cycle of the product.

actual *production process* became seen as something that could in principle be done by someone else. As the MNEs moved their focus away from production towards *branding* they outsourced manufacturing to contracting companies in other countries with cheaper labor costs. The firm that pioneered this new business model which was soon copied all over the corporate worlds was Nike Inc. Nike's Phil Knight summarized the idea clearly when he said: "There is no value in making things anymore. The value is added by careful research, by innovation and by marketing" (Katz 1994, 204).

In the process of assuming this new business model, MNEs have become ever more interconnected with other firms. This results in a network consisting of the multinational enterprise (the *lead firm*) and the businesses it cooperates with, which is so important for business operations that it is sometimes called the "Extended Enterprise".⁸⁷ Nowadays, complex global supply chains involving many legally independent firms are thus an integral, highly important part of MNEs' business operations.

In the new, global supply chains of MNEs working conditions were and still are often appallingly bad. There are widespread violations of human rights and international labor law (Dicken 2007, 257f). This concerns issues like poor safety conditions, harsh disciplinary measures, no overtime regulations, no maternity protection, no possibility for workers to organize in unions, bad pay, and child labor. In many cases they even concern issues of slavery and slavery-like conditions.⁸⁸

Controls in suppliers of MNEs showed that in about 90% of cases there were shortcomings involving some of the above issues (Deutscher Bundestag 2007). For example, in about 30% safety conditions were critically bad, and in 50% national overtime regulations were not complied with (BSCI 2005; Manhardt/Griesshammer 2006; ILO 2007; cf. Starmanns 2010, 12). In fact, "many argue that there is hardly a factory in the 'Global South' that has properly implemented the ILO Core Norms and 'living wages'" (Starmanns 2011. Cf. Locke et al. 2006 and 2007; Barrientos/Smith 2007).

Bad working conditions such as these occasionally occur in branches of the lead firm, but mostly they happen in suppliers and sub-contractors in developing countries along the global supply chains of MNEs, where legal social standards are lower and compliance with them more precarious. The lead firm's headquarters on the other hand (and the consumers who buy the goods they produce) are usually situated in developed countries with higher legal and social standards protecting the workers.⁸⁹

Starting with the 1990ies public campaigns directed at big brands such as Nike, Microsoft, Levis etc. a broad public became aware of the bad working conditions in the supply chains of MNEs. In the course of these campaigns, NGOs and the public widely criticized MNEs as engaging in unfair or unethical trade for selling products made under such bad conditions, e.g. in so-called

⁸⁷ See e.g. <http://jpfarrell.blogspot.com/2008/04/extended-enterprise.html>.

⁸⁸ For an overview of the empirical issues see for example Hartman et al. 2003, for modern slavery e.g. Manzo 2005.

⁸⁹ However, there are many examples of shockingly bad working conditions within industrialized countries as well. Often they concern migrant workers who work either illegally or are not well protected by the laws.

“sweatshops” (*per definition* factories with bad working conditions). They claimed that MNEs carry a responsibility for poor working conditions in their supply chain, and pushed them to remedy them ⁹⁰ In some cases, the public actively used its economic power through boycotts to push MNEs to do so.

Many people share the intuition that the moral outrage directed at MNEs for said reasons is justified. Others, among them many economists, argue that such criticisms are deeply mistaken. They argue that the MNEs’ trade leads to economic growth in the region, which benefits local people, and that they are offering jobs which people would otherwise not have.

In the following, we will look closely at the claims of unfairness and immorality directed at MNEs in this context, analyzing their ethical justification and assessing their plausibility. As we will see, notwithstanding their intuitive appeal it turns out to be surprisingly difficult to defend some of these claims. Nevertheless I will show possible ways to do so.

Let us first consider how we can formulate the main claims that are made when MNEs are accused of unfair trade with regard to their supply chains. What we are especially interested in is what implicit or explicit understanding of fair trade these claims imply.

As I see it, we can identify three main claims on the matter:⁹¹

- (h) Unfair trade on the level of MNEs is trade that fails to *duly consider or equalize the interests* of the workers in their supply chains.
- (i) Unfair trade on the level of MNEs is trade that doesn’t *distribute the burdens and gains* of trade in a *proportional* way throughout their supply chains.
- (j) Unfair trade on the level of MNEs is trade that is involved in *exploitation* through their supply chains.

Formulated as claims on *fair* trade, they read:

- (h) Fair trade on the level of MNEs is trade that *duly considers or equalizes the interests* of the workers in their supply chains.
- (i) Fair trade on the level of MNEs is trade that *distributes the burdens and gains* of trade in a *proportional* way throughout their supply chains.
- (j) Fair trade on the level of MNEs is trade that is not involved in *exploitation* through their supply chains.

The remainder of this chapter is dedicated to discussing these three claims and their moral foundations. Let us lay out the analytical framework for the task at hand: to make a judgment

⁹⁰ See e.g. Mamic 2005.

⁹¹ I don’t claim that my suggestions are exhaustive of all the relevant claims that are and can be made on the matter. Rather they constitute some of the most prevalent ones which I want to subject to analysis.

on the question if, and in what sense, the mentioned claims and criticisms are justified, we need to 1) formulate the argument for the claims, identifying their (partly implicit) premises, and 2) discuss these premises and the normative assumptions and theories they rest on. We will start with (m).

7.2 Position (h) Fair trade is Trade that Duly Considers or Equalizes the Interests of Workers in the Supply Chains.

The first position I want to discuss understands fair trade on the level of MNEs as trade which duly takes into account or equalizes the interests of the workers their supply chains. The position that fair trade requires that the interests of the involved people be respected can be seen as an important normative base of the Fair Trade movement's understanding of fair trade. In the same vein, it is often argued that trade is fair if it is based on activities which equalize the interests of each affected party (e.g. Bhagwati 1996, Koslowski 1996). On the base of this position MNEs are considered to be guilty of unfair trade if they fail to duly consider the interests of the people in their supply chains. The respective claims can be formulated as: *trade is fair if it duly considers the interests of the workers in the supply chains*; and *trade is fair if it equalizes the interests of the workers in the supply chains*. Understood in the former sense, in my terminology the position that is about *ethical trade*. Understood in the latter sense, depending on how we understand the position, it can be understood as being about *fair trade* in the sense of the fairness standard of the proportional fulfillment of stringent claims (see 4.6). In any case, the position concerns the procedural and outcome dimension of trade, and the duties resulting from the position are directed at individual trading actors. In the former case they demand of them to duly consider the interests of the workers in their supply chains, and in the second case to proportionally fulfill their stringent claims.

The above position is based on *stakeholder theory*. "Using the language of business ethics we might argue that fair trade implies the taking into consideration of the interests and values of different stakeholder groups" (Boda 2001, 22, cf. Koslowski 1996). The basic idea of stakeholder theory as opposed to *stockholder* theory is to replace "the notion that managers have a duty to stockholders with the concept that managers bear a fiduciary duty to stakeholders. Stakeholders are those groups who have a stake in or claim on the firm"⁹² (Freeman 2001, 56). According to the stakeholder approach, for example consumers as stakeholders have a moral right to get good quality product and relevant information concerning its traits, including, presumably, the conditions of its production; competitors have a right to fair competition; employees have a moral right to be treated decently; local communities have a moral right that the integrity and healthiness of their living

⁹² There is a narrow and a wide interpretation of the term stakeholder: On the narrow one, stakeholders are those groups that are vital to the survival and the success of the firm. According to Freeman this includes the owners, employees, customers, managers, suppliers, and the local community. On the wide definition, stakeholders are any group that affects or is affected by the actions of the firm (ibid., 59). Freeman himself uses the narrow definition for his further analysis.

environment be respected, etc.⁹³ Suppliers and their workers are considered stakeholders in different interpretations of the concept of stakeholder.

While the rights of some stakeholders are protected rather well in current global trade (e.g. consumers in industrialized countries), it is usually argued that especially the moral claims of small producers and workers in the supply chains of MNEs are not properly taken into consideration by international trade. The Fair Trade movement addresses this problem by explicitly treating producers and workers in the supply chains of MNEs as central stakeholders whose rights and interests trading companies have a responsibility to respect. In their own trading structures the Fair Trade movement tries to build cooperative relationships with producers and workers in the South, to support them where necessary and to let more income flow back to them.

Position (h) is best seen as based on the following argument:

(P1) Trade in the supply chains of MNEs is fair if it respects or equalizes the interests of their stakeholders

(P2) The workers and producers in the supply chains of MNEs are stakeholders

(C) Trade within the supply chains of MNEs is fair if it duly respects or equalizes the interests of stakeholders in their supply chains

While premise (P2) is rather unproblematic, premise (P1) will have to be examined more closely. Premise (m1) is an expression of the stakeholder approach to business ethics and claims that companies and their managers have obligations to all the corporate stakeholders and faces the task of balancing their conflicting interests.

Let us examine what are the normative bases of (P1). In other words, how is this claim justified? Bowie/Werhane (2005) argue in the following way: "A stakeholder theorist takes the needs and interests of all the corporate stakeholders as ends. A stockholder theorist takes the interests and needs of the stakeholders as means to an end. The moral philosophy of Immanuel Kant (...) can be invoked here to show that the stakeholder theory is the one that should be adopted. Kant held that the motive for an action was the determinant of its morality. If something is done for the wrong motive, even if it leads to good results, the action is not a moral one. (...) Kant also argued that a moral motive was one that treated a person as an end and never as a means (...) Using people as instruments is wrong even if they are treated well in the process" (ibid., 35).

We could also try to base the stakeholder approach on a contractualist perspective along the lines of Scanlon (1998). In this sense we might argue that a pure shareholder approach to business

⁹³ Stakeholder notions have been incorporated in the concept of management for sustainability as measured by triple bottom-line accounting. The latter refers to the three realms of "people, planet, and profit" which managers have a moral obligation to consider in their decisions: they are seen to have an obligation to behave in a socially responsible way, to protect the environment, and to ensure the financial health of the organization (cf. Bowie/Werhane 2005, 27-28).

management would be reasonably rejectable from the perspective of certain groups affected by it.

Let us assume for the sake of the argument that some plausible justification of the stakeholder approach can be provided. Now, what does duly respecting or equalizing the interests of all stakeholders imply?

It is actually a main criticism of the stakeholder approach that it does not provide clear guidance for the question how to prioritize the clashing interests of different stakeholders. As the critics point out, there are hardly any plausible suggestions in this respect. For this reason, the stakeholder approach is often criticized as being conceptually fuzzy and impractical to implement (cf. Bowie/Werhane 2005, 29).

Let us look at a prominent suggestion regarding this question, which is, however, situated on a high level of abstraction. According to Freeman's view, the normative core of the stakeholder approach is that there are "fair" contracts between the firm and its stakeholders⁹⁴ (Freeman 2001). This again could be understood in different ways. Freeman himself, operating on an implicit understanding of fairness as impartiality, suggests applying Rawls veil of ignorance to a hypothetical situation where the stakeholders agree on the basic principles for managing the firm – that is, they do so not knowing which of the stakeholders they are (Freeman 2001, 63). He goes on to argue that stakeholders behind the veil of ignorance would agree on the following six principles or „ground rules“ for the management of a business: 1. the principle of entry and exit (clearly defined entry, exit and renegotiation conditions), 2. the governance principle (procedures for changing the rules must be adopted by unanimous consent), 3. the principle of externalities (any contract between A and B that imposes costs on C makes C a party to the contract), 4. the principle of contracting costs (all parties to the contract must share in the cost of contracting), 5. the agency principle (the manager must serve the stakeholders), and 6. the principle of limited immortality (sustainable serving of the stakeholder interests) (Bowie/Werhane 2005, 27).

Note that this is about general principles, not the question how to equalize the interests of stakeholders in particular situations. In this sense, the stakeholder approach is particularly valuable in terms of offering a general normative outlook on the moral duties of companies. It can also be used as practical guidance for management decisions in particular situations, but this has serious limitations when stakeholder interests seriously clash. One such case is of course remuneration of different stakeholders, where the stakeholder approach as a general outlook does not get us far.

Note that the above principles concern only the fairness of the terms and processes of transactions, and don't contain principles about the distribution of costs and gains. (P1) itself is ambiguous in terms of the procedural/outcome dimension: "To duly respect someone's interests"

⁹⁴ This contract language is shared with a standard view that the firm is a nexus of contracts (cf. Jensen / Meckling 1976), but Freeman adds a normative dimension to it by claiming that the contracts among the stakeholders must be "fair".

can be understood as respecting them in the *process* of the transactions, i.e. through a process that lets them be heard, such as a truly deliberative process as opposed to a power-play negotiation. This could serve as a base for the claim for living wages, since they are certainly among the most basic interests a stakeholder group can have.

But it can also be understood as respecting these interests directly in the *outcome* of the transaction via an independent criterion of outcome justice that equalizes the claims to shares of the productive surplus. If the former is at stake, this presumably plays out as demanding some sort of *deliberative* process with regard to determining the working conditions. If we focus on the latter, we will need a criterion for deciding what a just distribution of costs and gains amounts to in this context.

Regarding the latter issue, we have to turn to a related position on fair trade, which can be understood as a sub-claim of the general position h) we have just discussed. This position focuses on the outcome dimension of trade and claims that a condition for fair trade is a just distribution of the costs and gains of trade within supply chains.

7.3 Position (i) Fair trade is Trade that Proportionally Distributes the Burdens and Gains of Trade throughout the Supply Chains

The second perspective on fair trade on the level of MNEs considers it as trade that proportionally distributes the burdens and gains of trade throughout their supply chains. Understood in this way, unfair trade in the supply chains of MNEs concerns the distribution of the gains of trade throughout these supply chains. This criticism usually comes in the form that “[B]randing (...) has been hogging all the ‘value-added’” (Klein 2010, 197) whereas producers in developing countries are getting only a “disproportionally” tiny share of the profit. For example with regard to a T-shirt the MNE retains 50% of the selling price, whereas the remaining 50% are distributed among the many actors on several levels in the supply chains.⁹⁵ This unequal distribution of benefits along the supply chains is often considered to be unfair/unjust (cf.e.g. Klein 2010; Starmanns 2010).

In our standard form, the claim reads: *trade is fair if it proportionally distributes the burdens and benefits of trade throughout the supply chains*. In my terminology the position is about *fair trade* in the particular sense of *outcome fairness*; accordingly it concerns the outcome dimension of trade. The duties resulting from the position are directed at individual trading actors, and demand of them to distribute burdens and benefits proportionally throughout their supply chains. Let us investigate the moral bases of this intuition or claim.

It seems plausible to assume that this view is based on the fairness standard of a *proportional distribution of burdens and benefits*, as applied to supply chains. We remember from Part I that this fairness standard demands that people get a proportional share from goods that they contribute to

⁹⁵ The example concerns a Van Laack shirt, see *Frankfurter Allgemeine Sonntagszeitung*, 16.12.2007 (cf. Starmanns 2010, 12).

producing, since they get claims to benefits by contributing to the burdens of producing the good in question. We recall that on a more fundamental level, this is based on the norm of positive reciprocity. We also remember that this fairness standard concerns what I called *cooperative justice*, which is one of the two cases (alongside allocative justice) where the *outcome* is directly relevant for judgments of justice (see chapter 3.5.1). And finally we remember that cooperative justice applies in the case of people standing in a *cooperative* relation to each other, the cooperation producing certain burdens and benefits in the form of either common or public goods.

On this background we can say that those voicing the above criticism about an unfair or unjust distribution of the gains of trade within the supply chains of MNEs seem to be implying that supply chains should be seen as cases of *cooperation* and accordingly trigger the fairness standard of a proportional distribution of burdens and benefits. Let us put this claim in the form of an argument to consider it in more detail.

- (P1) In cooperative interaction schemes, fairness requires that contributors receive a fair share of the benefits of the cooperation
- (P2) Supply chains of MNEs are cooperative interaction schemes
- (P3) “Contributors” in the supply chains of MNEs include workers
- (C1) Workers in the supply chains of MNEs have a claim to a “fair share” of the benefits of the cooperation

Let us assume that (P1) is correct, since this view is generally well accepted and plausible (see Part I). (P3) seems to be uncontroversial. It seems then that (C1) hinges primarily on the plausibility of (P2), namely the question if supply chains of MNEs can plausibly be understood as cooperative interaction schemes. Besides, it seems highly questionable if it is possible to operationalize what a *fair share* (i.e. a part of the gains of trade in proportion to the productive contribution of an actor) in the supply chains of MNEs amounts to. In the following we will therefore consider these two issues, starting with the latter.

7.3.1 Distributing Burdens and Benefits Throughout Supply Chains Proportionally

For operationalizing what a “fair share” in the supply chains of MNEs amounts to, „What is needed is some theory of fairness to determine how the revenues of a firm should be divided among the stakeholders who contribute to making those revenues. In other words, in an ideal world, we could measure the contribution of each stakeholder to the success of the firm, subtract compensation received and end up with the profit. Stockholder theory says that all the profit belongs to the stockholders. Stakeholder theorists might argue that some of the „profit“ should go to lower prices for customers and increased wages for employees. But no theory says that management ought to get

as much of the profit as it can before distributing it to other stakeholders“ (Beauchamp 1992, 9).

When asking for more specific guidance in this respect from the stakeholder approach, it is again Rawls' hypothetical original position that is referred to: „Probably the best theory to evaluate (...) compensation is some version of justice theory. After all, we are looking for the fair means of dividing up the profits from the cooperative efforts of the various stakeholders in a business“ (ibid., 10). Beauchamp goes on: “Suppose all the various stakeholders were gathered together in one spot to decide how the income from a firm should be divided up. Thus representatives from labor, capital, management, and the local community would all be present. (...) We believe that stakeholders behind the veil of interest would adopt principle 1 and part (b) of principle 2. What is more problematic is whether they would choose part (a) where any inequalities must work to the benefit of all. Our doubt about whether part (a) would be unanimously accepted shows how difficult it is to step behind the veil of ignorance. Our own brand of capitalism already has a long-established history and it is hard to imagine theories of compensation that are too divorced from our own experience. Suppose we allow knowledge of our legal system and economic system to be outside the veil of ignorance. Our best guess is that stakeholders would agree that stockholders are entitled to a certain historical percentage of profit traditionally defined. However, profit that results from productivity gains, through improved technology or increased worker efficiency, should be split more or less evenly to the various stakeholder groups or distributed according to objective measures of the contribution of each stakeholder group to the ‚abnormal‘ increase in profits. All this sounds indeterminate and so it is. But we think that it is still more reasonable than the myth of the strong CEO who single-handedly turns a company around. A CEO does not do that by him or herself“ (ibid., 11).

So, let us consider if it is in principle possible to operationalize what a “fair share” of the gains of trade in the supply chains of MNEs amounts to. How then could we conceive the application of the fairness standard of distributing burdens and benefits proportionally to the case of supply chains?

I think that in theory, this might be possible in an approximate way. Let us briefly sketch a suggestion of how this could be done.

The idea would be to look at the productive contribution (“burdens”) of the different actors involved in the production of a final good and their relative reward (“benefits”) across the supply chain. This would then amount to a sort of proportional distribution of burdens and benefits amongst actors in a supply chain. The profit of the joint production in this perspective is to be distributed among the people who contribute to the end product. By the profit of a company I mean its gain above the interests on its capital. I take the latter to be the legitimate property of the company (see below).

Now, to assess the relative productive contribution of different actors in the supply chain (or

in the above scheme, their „costs“), we would need an objective criterion. Recall that as an objective criterion to define the production value of a good or service, the labor theory of value proposed the average labor time that goes into the production of the good, multiplied by its quality factor. We have to adapt it to account for three relevant factors besides working time and quality: the role of capital and the idea of set up achievements of the founder of the company, different kinds of work (e.g. agricultural work and marketing), and different purchasing power at various places.

I take it to be legitimate that the invested capital generates some interest, although there should be an upper limit to it. What would be needed to determine this upper limit is a theory of fair interest, which so far has not been formulated. Nevertheless, I think we could for the time being work with a certain approximate rate for a decent upper limit. Further I suggest accounting for different kinds of work by including the time necessary to learn the skills for the respective function (possibly also the financial cost of the respective education). And thirdly I suggest including a purchasing power parity factor. The latter ensures that outsourcing to developing countries still makes sense when applying my framework.

Including all these factors leads to the following tentative formula to calculate fair wages and prices in the supply chain of companies⁹⁶:

$$W_i = (x_i \cdot c_{ppi}) / (x_1 \cdot c_{pp1} + x_2 \cdot c_{pp2} + \dots) \cdot (PQ - rK - \text{Vorleistungen})$$

Where:

W_i = salary

$x_i = t_i \cdot q_i$

$q_i = 1 + (t_i/T_i) \cdot t_{\text{education}}$

$t_{\text{education}}$ = time of education

T_i = life working time

c_{ppi} = purchasing power parity factor r

$\leq r_0$, where r_0 = max. decent interest K =
invested capital

P = product price

Q = number of sold products

This perspective to determine fair wages and prices in the supply chain of companies would accordingly not lead to absolute minimal wages or prices as requirements of fairness, but to a certain ratio of labor input and gain throughout the supply chains of companies with regard to the

⁹⁶ This suggestion for a formula expressing the contribution of different actors in the supply chains was designed with the help of Andreas Cassee.

overall performance. It would quantify how companies could distribute their profit in a way that rewards the people in their supply chain according to their contribution to the end product. It is thus a *relational* standard, meaning that the more profit a company makes the more it is required to pay the people in their supply chain, each according to their contribution to the end product. Since the fairness-standard is relational, it is in principle conceivable that it is met by paying below subsistence wages and prices, namely in the case when the company makes no or just a very marginal profit. This could for example apply to small startup businesses or to situations when a usually profitable business is going through a difficult phase etc. But those cases are certainly not the rule with respect to big MNEs, which generally make quite substantial profits.

Clearly, there are points in the above suggestion that could be challenged. However, my point here is mainly to show that the above argument is not necessarily bound to fail in theory because of a theoretical impossibility to operationalize the proportional share of contributors. However, the question is different with regard to the *implementation* of such a proposal.

Clearly, position (i) would be extremely precarious in terms of implementation. We remember that Rawls argued that in a context as complex as the interactions of a whole society, it would be close to impossible to decide how cooperative outcome justice should distribute shares in accordance with people's contribution to society's good, and it would bring with it a plethora of other problems. As such, it would presumably undermine crucial functions of the free market system that we examined in Part I, such as its self-regulation of supply and demand through the price mechanism.

For these practical reasons Rawls, as we have seen before, advocates that the system be set up such that it can work as one of pure procedural justice.⁹⁷ The market as an objective, decentralized system of value distribution is to take over a substantive role in determining burdens/contributions and benefits, whereas people's chances for success in the market are to be equalized in their formative phase and those that cannot participate successfully in the market are taken care of by the community.

Besides the problem of implementation, the problem with (i) is (P2). Let us therefore return to the question if understanding the supply chains of MNEs as cooperative interaction schemes can plausibly be justified.

7.3.2 Are Supply Chains Cooperative Interaction Schemes in the Sense of Demanding a Just Distribution of Benefits?

Although it might at first resound with our intuitions, we should certainly take a very cautious perspective with regard to the idea that supply chains are cooperative interaction schemes in the

⁹⁷ He does so in the national context, but the argument is in principle relevant for other contexts as well. See Part I.

relevant sense as to trigger the fairness standard of the proportional distribution of burdens and benefits of the cooperatively produced surplus. Supply chains, after all, are at least *prima facie* constituted by a sequence of economic transactions, and the (P2) obviously takes a rather peculiar perspective on the market based system of supply chains.

As was mentioned before, defending (i) would imply arguing that supply chains should be seen as cases of cooperation in the relevant sense as to trigger the fairness standard of a proportional distribution of burdens and benefits. Accordingly we will have to investigate if this is defensible.

While some actions are intuitively clearly cooperative, such as carrying a table together or singing a duet, others are more controversial, such as sports competitions and people keeping to one side of the road when driving to avoid crashing into each other. What elements are conditions of regarding something as cooperative action at all, and what kind of cooperation is necessary for triggering the fairness standard of distributing burdens and benefits equally?

The Oxford Dictionary of English takes cooperation to be the action of process of working together to the same end (cf. Tuomela 2011). Full-blown cooperation involves a shared goal and relevant shared beliefs about the means to its achievement, and joint action that purports to achieving the goal (ibid.). So-called ‘we-mode’ cooperation is at stake when the members of a group who conceive of “themselves as a social group capable of group action and in which they think and reason in terms of a non-aggregative ‘we’” (ibid.), with people sharing “some common goals, values, beliefs, norms” (ibid.). The latter, which is thus based on concepts of collective intentionality, is usually considered a strong kind of cooperation. It is *not* thought to require that each participant in the system cooperates with every other, but rather that the participants consider themselves as part of a bigger system of cooperation. The classic case is society-wide cooperation (cf. e.g. Rawls 1971). We- cooperation such as this is commonly thought to trigger the fairness standard of a proportional distribution of burdens and benefits among the cooperating parties.

However, although the component of the “same end” often appears in definitions of cooperation, it does not figure in all of them. The economic understanding of cooperation goes roughly as follows: “People act (...) cooperatively if and only if they contribute positively to an *outcome*, which is beneficial to (...) all and is better than outcomes without contribution” (Leist 2011, 19, emphasis added). In this sense, cooperation is understood as joint action conceptualized individualistically in terms of the participants’ individual goals and beliefs that the joint action is taken to serve (Tuomela 2010). This is often called ‘I-mode’- cooperation. I-mode cooperation essentially involves mutually adjusting one’s actions and goal to the other participants’ actions and goal “so as to further both the other’s goal (i.e. goal satisfaction) and one’s own goal” (ibid., 67). Here then, we don’t have a shared aim but different goals, the fulfillment of which are mutually furthered by the actions of the agents.

While we certainly don't have we-mode cooperation in the case of the relation between MNEs and their suppliers, it is plausible to consider the latter as a form of I-mode cooperation. The MNE has the goal to maximize its profits (possibly under some restrictive conditions such as the triple bottom line), while the supplier has the goal to maximize *his* profits. They further each other's goals by adjusting their actions: the supplier produces and sells the goods to the MNE as to the MNEs specification, whereas the MNE conduces market research, develops the products, and markets them. The supplier firm itself cooperates in the I-mode with its own suppliers and the sub-contractors it outsources to: It has the goal to maximize its profits (again possibly under some restrictive conditions such as the triple bottom line), while the suppliers and sub-contractor have the goal to maximize *their* own profit by selling to them at the highest price possible. The workers of both the direct supplier and the sub-contractor are in turn cooperating with the management of their respective firms, their goal being to gain a wage as high as possible.

The cooperative nature of this becomes especially clear if we consider the description of the relation between MNEs and their suppliers in production networks provided earlier: there is a lot of complex coordinating interaction involved. Far from being mere market exchanges with price being the only coordinating factor, they usually go way beyond with regard to the coordination of activities and exchanges on different levels, including goods, services, and knowledge. Relations are often based on long term relationships between suppliers and buyers, some involving frequent face-to-face interactions. All forms of value chains involve beneficial interactions and the creation of a surplus. Besides, the contribution of all the parties is needed for the creation of the final product which forms the material basis of the multinational enterprise's business. Through these interactions, the owners and workers of the suppliers contribute relevantly to the benefit which the multinational company (and the supplier factory) gets from the "cooperation".

However, the problem with understanding the whole supply chains of MNEs as schemes of cooperative action seems to be that cooperation is usually not thought to be transitive: if A cooperates with B and B cooperates with C, it does not result that A is cooperating with C. If an MNE cooperates with its direct suppliers and they in turn cooperate with their suppliers and sub-contractors it does not follow that the MNE is cooperating with the sub-contractor. Accordingly this cannot serve as a basis for claiming that the MNEs is cooperating with their whole supply chains. For this we would need another reason. As we said before that it is implausible to consider supply chains as contexts of we-mode cooperation, this leaves us with the conclusion that it is unclear how we could plausibly understand supply chains as schemes of cooperative action that trigger the fairness standard of a proportional distribution of burdens and benefits.

7.3.3 Conclusions on (i)

Let us look at the implications these points have for the claim that "fair trade" requires a

proportional distribution of costs and gains throughout the supply chains of MNEs in the current global market. First, it is not normatively called for to distribute the gains of trade proportionally throughout the supply chains of MNEs because they cannot sensibly be conceived as cooperative action schemes in the relevant sense. Second, although we could somehow operationalize such a distribution in theory, its implication is neither feasible because of its complexity nor desirable because of its undermining of relevant functions of the market.

This, however, doesn't let MNEs off the hook completely. Since there are no distributive global background institutions that correct the distributive results of the market at least in a minimal sense, it does not seem justified to restrict the ethical assessment of the actions of market actors regarding individual transactions to a criterion of pure procedural justice. Rather, it suggests that some sort of additional criterion is warranted. I take it that another position on unfair trade offers a promising suggestion in this respect, and I will analyze this position in detail in the following.

7.4 Position (j) Fair trade is Trade which is not Involved in Exploitation Through their Supply Chains

Many people seem to think of unfair trade in the supply chains of MNEs in terms of the exploitation of laborers in developing countries (cf. Risse 2007, 357). According to this view, "Generally speaking trade is fair if it is based on activities which do not exploit the workers and the natural environment" (Boda 2001, 22). Accordingly, fair trade on this level is usually understood as trade without such exploitation. Boda takes this view to be one of the prevalent positions on what "fair trade" must avoid (namely exploitation), and that this view constitutes a common trait of diverse fair or alternative trade movements (ibid.).

Focusing on MNEs this can be formulated as the claim that MNEs are guilty of engaging in unfair trade when they are involved in *exploitation* through their supply chains. In our standard positive form the claim reads: *fair trade within the supply chains of MNEs is trade which is not involved in exploitation through their supply chains*. In my terminology the position is about *ethical trade* in the sense of not violating people's rights in the context of trade; accordingly it concerns the procedural dimension of trade. The duties resulting from the position are directed at individual trading actors, and demand of them not to be involved in exploitation through their supply chains.

Let us then take a closer look at this claim in this negative form. To assess this claim we first need to bring it in the form of an argument with premises that we can subject to scrutiny. I suggest that this argument looks as follows:

- (P1) Exploitation is morally blameworthy and unfair / there is a moral duty not to engage in exploitation

- (P2) If there are exploitative transactions in the supply chains of an MNE, the MNE is responsible for them
- (P3) Being responsible for exploitative transactions is a sufficient condition for MNEs being blameworthy and engaging in unfair trade
- (C1) MNEs are blameworthy and are engaging in unfair trade if there are exploitative transactions in their supply chains.
- (C2) Fair trade within the supply chains of MNEs is Trade which is not Involved in Exploitation Through their Supply Chains

7.4.1 (P1) Exploitation is Morally Blameworthy and Unfair / there is a Moral Duty not to Engage in Exploitation

At first glance it might seem that (P1) is so trivial as to not merit being discussed at all. It is true that exploitation is a thick ethical concept that already *implies* that it is morally wrong. However, as we will see, the concept is extremely complex and it is disputed if all forms of exploitation are actually morally wrong and morally prohibited (see below). Let us start with the concept of exploitation.

7.4.1.2 The concept of exploitation

The term “exploitation” is used in relation to some kind of interactions. Note that there *is* a non-moral sense of the notion “to exploit something”, just as is the case with “taking advantage” of something or someone (see Part I): we can say that someone “exploits” the weak backhand of her opponent in a tennis match, meaning simply that she “made use” of it for her advantage. This statement is morally neutral. What we are interested in on the other hand is in *wrongful* exploitation. This negatively connoted, wrongful “exploitation” evokes moral reactions. It is a thick ethical term that implies the wrongness of the associated actions.

Let us say that a claim that A’s interaction with B is wrongfully exploitative is called an *exploitation claim* (Wertheimer 2011, 199).⁹⁸ What a theory of wrongful exploitation needs to provide is 1) the truth conditions for an exploitation claim. Question 2) that a theory of exploitation has to answer is according to Wertheimer why and under what conditions we are justified to prohibiting, regulating or interfering with exploitative transactions (ibid.).

Regarding 1), in our case whether it is *true* in a particular case that a company wrongfully exploits their workers (P2) depends on whether the truth-conditions of the exploitation claim are fulfilled.

Regarding 2), even if it is true that A exploits B in a certain situation, “it doesn’t follow as a

⁹⁸ Usually wrongful exploitation is used with regard to *people* being exploited. This distinguishes it from the morally neutral use of the notion (see above). However, sometimes it is also used with regard to impersonal things, e.g. nature, and animals. My focus here is on people being exploited.

matter of moral logic that we should prohibit or regulate the transaction between A and B” (ibid.), since B might prefer to be exploited to not being interacted with at all. As an illustration, consider the following case: A’s car got stuck in the mud in a remote area. B comes upon the situation by chance and offers to tow A’s car out for 200\$. In this situation we can imagine A saying that he knows that B is exploiting him in that transaction, but that he nevertheless prefers to be towed out for this fee to being left in the mud (cf. ibid.).

In our case, 2) translates to the question under what conditions exploitation should be prohibited, regulated or interfered with. However, as in the above example, we can also come to the conclusion that exploitative action of A towards B is unfair and/or morally unacceptable, but that it should nevertheless be allowed *all things considered*.

7.4.1.3 Exploitation as unfair advantage taking in exchanges

At the most general level, a widely accepted description of the moral wrong involved in wrongful exploitation is “unfair advantage taking of someone (or something)”.⁹⁹ Another way to put this is that one party exploits another when it gets “unfair and undeserved benefits from its transactions or relationships” (Wertheimer 1996, x (preface)).

In this sense, *unfairness* is accordingly seen as a necessary (but not sufficient) condition for exploitation. This means that in claim A), “*unfair trade*” on a general level is explicated as “trade involving *unfair advantage taking*” of someone or something. Interestingly then, when we understand unfair trade as trade involving exploitation, the concept of unfairness appears both in the *explanans* and in the *explanandum*. Nevertheless, the explication is potentially illuminating since it allows us to reformulate the question what unfair trade is to the more specific question what *unfair advantage taking in economic transactions amounts to*. The context that we are concerned with in this chapter is *labor exploitation* in a (supposedly) free market. We can accordingly spell out the question what unfair trade is as the question what *unfair advantage taking in market transactions amounts to*.

If we want to see what unfair advantage taking in transactions amounts to we turn again to the concept of exploitation which has been investigated far more than the former.

Analytically, we can distinguish between harmful exploitation and mutually beneficial exploitation. By harmful exploitation we mean cases in which the exploiter gains by harming the exploitee. By mutually advantageous exploitation we mean “those cases in which both parties – including the exploitee – reasonably expect to gain from the transaction as contrasted with the pre-transaction *status quo* or more accurately, as contrasted with their pre-transaction rights or entitlements” (Wertheimer 2011, 201).

We can further distinguish between non-consensual exploitation and consensual exploitation.

⁹⁹ See Anderson, Scott 2006.

By *non-consensual* exploitation, the exploitee does not give normatively transforming consent to the transaction. This can mean two things, A) the exploitation itself may render consent non-transformative in certain ways, or B) consent is understood in the usual way as voluntary, competent, informed, etc. (Ibid., 201) In *consensual* exploitation the exploitee gives the (normatively or otherwise) relevant consent to the transaction.

Because the two distinctions usually overlap (although there are imaginable cases where they don't) we will in the following use the compound notions of harmful- nonconsensual and beneficial-consensual exploitation.

7.4.1.4 Harmful non-consensual exploitation in labor relations

In the above sense, we can say that those working conditions are harmfully exploitative which wrong workers and/or violate their moral rights. So which are these?

The clearest candidates are certainly what I call *rights-violating* working conditions (P1a). They concern basic human rights violations, including cases of harmful, non- consensual exploitation, as paradigmatic moral rights violations. The assumption that where they happen routinely in the work context they constitute morally unacceptable working conditions is widely shared and uncontroversial.

The second candidate is what I call *unfair* working conditions (P1b). They concern beneficial, consensual exploitation of workers, which will be discussed in the next section. The assumption is also widely shared that where beneficial, consensual exploitation happens, this too constitutes morally unacceptable working conditions. In the last chapter we have considered the charge and nature of exploitation in some detail, so we can build on these elaborations for the present purpose.

Let me start with (P1a). Because of its uncontroversial nature I will not dwell on justificatory issues here but rather elaborate on how the relevant basic human rights bear on the work-context, pointing to the legal formulations of these rights in international documents.

The relevant Human Rights in the work-context

The most important basic rights relevant in working relations include: 1) The right to freedom, which forbids slavery and any other kind of forced labor. 2) The right to physical integrity, which forbids corporal punishments of any sorts, working conditions that damage or severely endanger the health of the workers (including inadequate safety measures such as emergency exits in factories). 3) The right of children to protection from exploitation and to an education, which forbids many forms of child labor. Possibly 4) The right to a living wage. While the former three are uncontroversial negative rights, the latter, as discussed before, is a positive right and thus controversial.

The Articles of the Universal Declaration of Human Rights (UDHR 1948) provide specific examples of what it means to respect an employee's right to freedom in the context of work. Particularly relevant are Articles 3, 4, 5, and Article 23, section 4. The former three read "Article 3:

Everyone has the right to life, liberty, and security of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

As such they provide a basis for the prohibition of all forced labor, indentured servitude, corporeal punishment, and seriously unsafe working conditions.

On the other hand, the right to freedom of belief and expression (as part of the right to freedom) adapts to a certain extent to the working context. For example, it is, “not an illegitimate infringement of one’s right to freedom of believe and expression if an employer prohibits proselytizing on behalf of one’s religious convictions while at work. Such activity is typically disruptive and as such incompatible with the purposes for which employees are hired.” (ibid.) In the same vein, an employer is not violating the same right when he terminates a worker at the front desk of a luxury hotel if he shows up one day with a full- face tattoo – again, if this is conceived as being incompatible with the purposes for which the employee is hired (there certainly is room for dispute about when exactly this is the case).

The right to physical integrity prohibits basic physical infringements of any sort in the work context, and will therefore rule out e.g. corporal punishment, restrictions regarding necessary body functions, such as e.g. a rule that prohibits eating food in a long work shift, or a rule that permits only one bathroom break per day (cf. Arnold 2003, 89f).

Finally, Article 23 UDHR, section 4, provides a basis for the prohibition of firing employees for organizing or joining a trade union: “Everyone has the right to form and to join trade unions for the protection of his interests.” (cf. ibid., 89f). As will become clear later on the practical relevance of this right can hardly be overestimated.

The Articles of the United Nations Universal Declaration of Human Rights also provide a valuable resource for determining what it means for an employer to respect an employee’s right to well-being (see below). Article 23, section 2, provides a basis for the prohibition of discrimination based on arbitrary characteristics such as race or sex. Article 23, section 3, and article 25, section 1, provide a basis for paying employees wages that are consistent with living with dignity. They also provide a basis for thinking that it is the responsibility of MNEs to ensure that social security and other taxes are paid to appropriate governmental authorities. Article 24 provides a basis for the view that employees are entitled to wages adequate for a dignified standard of living without working extensive overtime hours:

Article 23

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other

means of social protection.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (cf. Arnold 2003, 91-92).

Besides the UDHR Articles, other important documents are the International Labor Organization's (ILO) publications, such as its 1998 *Declaration on Fundamental Principles and Rights at Work*, which identifies the core ILO conventions, and received much international support, among others from the UN, the World Bank, and the EU (ibid., 37). These core conventions concern the areas of forced labor, child labor, discrimination, and of freedom of association. In addition, the ILO's carefully developed conventions and recommendations on safety and health provide a detailed template for minimum safety standards. Both the UN and the ILO provide specific guidance to MNEs via the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977) and the United Nations Global Compact.

7.4.1.5 Beneficial consensual exploitation in labor relations

As I said, most of the above mentioned rights and prohibitions are quite uncontroversial from a moral point of view since they concern negative rights. With regard to living wages however, they are a case of beneficial, consensual exploitation, and the question is why beneficial, consensual exploitation should be morally unacceptable at all. After all, if someone is benefitted by a transaction and voluntarily consents to it, why is this not enough to make the transaction morally acceptable?

To discuss this question we will examine several lines of argument that argue that beneficial exploitation in the supply chains of MNEs in developing countries is in fact morally *acceptable*. I will present and discuss the main two lines of argument for this claim below:

- a) The “non-worseness” argument, which concerns the *outcome* dimension of transactions: transactions in free markets per definition make both parties better off, and making someone better off cannot be morally wrong.
- b) The “volenti fit iniuria” argument, which concerns the *procedural* dimension of transactions: Transactions in free markets are based on contracts which require the voluntary consent of both parties. Therefore they cannot be morally wrong.

In discussing these claims we will clarify our understanding of exploitation and its relation to unfairness. In particular, we will aim at understanding the interplay between the structural, procedural and outcome dimension of exploitative transactions and identify where the moral flaws are actually located.

7.4.1.5.1 The non-worseness argument

The first line of argument focuses on the immediate benefits for people’s well-being resulting from companies (in the supply chains of MNEs or otherwise) offering people jobs and an income that they would otherwise not have. MNEs have vehemently defended themselves against charges of (beneficial) exploitation by claiming that they are instead doing something good by offering jobs to people who otherwise wouldn’t have jobs.

This is called the “non-worseness” argument and goes as follows:¹⁰⁰ Free market transactions only take place if they make both parties better off, and if the MNE does not make the transaction partner worse off but rather *better* off, how could this be morally wrong? Differently put, how can an MNE be “*more morally blameworthy for doing business with a sweatshop that pays less than adequate wages than for doing no business abroad at all, even if workers in the unethical sweatshop would prefer and freely choose their work over the option of no work at all*”? (Zwolinski

¹⁰⁰ For this and the following cf. Wertheimer 2011, Zuber 2010.

This is indeed puzzling. It seems that we have two incoherent intuitions competing with each other: on the one hand the intuition that assisting people in dire need is demanded by morality, and on the other hand the intuition that certain “exploitative” transactions are forbidden by morality.

It seems that, as a matter of descriptive psychology, common public opinion holds that all exploitation is worse than non-engagement or neglect. But public opinion might be wrong. What needs to be shown is if this judgement is *justified*. In fact, Wertheimer suspects that the reason why public opinion considers all exploitation worse than neglect is that the word ‘exploitation’ is generally associated with the thought that the interaction is *harmful or non-consensual*. If this is correct, then “the tendency to ‘often regard’ exploitation as worse than neglect may not reflect the moral reality when the exploitation at issue is mutually advantageous and consensual” (Wertheimer 2011, 294). In this sense, it might be that our moral intuitions on the matter are flawed because they involve an unacknowledged ‘transfer’ of intuitions associated with harmful non-consensual exploitation to mutually advantageous and consensual transactions (cf. *ibid.*)

So let us see how the non-worseness claim looks in the form of a formal argument so we can consider its premises in detail and make our judgment based on reasons as opposed to mere intuitions. In the following reconstruction of the argument I will include the premises Wertheimer offers in his discussion of the non-worseness claim and supplement them with additional premises I consider to be missing for a convincing reconstruction of the argument. The non-worseness argument with regard to a transaction between A and B goes as follows¹⁰¹:

If

(P1) the interaction (transaction) in question is mutually advantageous (i.e. both A and B would be better off with than without the transaction)

(P2) in the situation in question, it is not morally wrong *not* to interact / transact

(P3) if it is not morally wrong to bring about a certain state of affairs (= no transaction), it *a fortiori* cannot be morally wrong to bring about a state of affairs where everybody is *better off* (= transaction) than in the former.

(C) It cannot be morally wrong to engage in the transaction in question

Let us look at the premises in detail. (P1) is unproblematic since this is simply how mutually advantageous transactions are defined.

(P2) is more interesting already. It is of course true that there is generally no duty to engage

¹⁰¹ Two premises included by Wertheimer are tacitly presumed but not explicitly mentioned here, because they are not at the core of the non-worseness argument: “the interaction has no negative effects on others”, and “A and B consent voluntarily to the interaction. Wertheimer 1999.

in any market transaction. But that is not the end of the matter regarding the truth of the premise. There are generally situations in which there *is* possibly a duty to (*inter*)*act*. A paradigmatic case is meeting someone in desperate need, which triggers the positive duty to help that person (at least if the cost to oneself is low). Now indeed, many transactions that strike us as clearly exploitative or unfair concern situations where one party is in a situation of desperate need, and another party, instead of simply *helping* the former, makes his help conditional on receiving something in return. Imagine a person in the desert near death from dehydration, who comes across a traveler carrying several water bags, and asks him for some water. But instead of helping him, the traveler asks for the desperate man's gold chain in exchange for some water. This demand strikes us as clearly exploitative. Here the traveler assumedly stands under a duty to assist the person in desperate need, and he violates this duty by making his help conditional on a request in return.

In this perspective then, the core of the moral problematic here is not that the *terms of the transaction* are exploitative or unfair, but that there is an *exchange* transaction *at all*: The morally required action in such a situation (at least *prima facie*) is unconditional *assistance*, not help conditional on something in return, which is what an exchange transaction in this situation amounts to. It seems simply wrong that we demand for something in return for helping a person in desperate need at low cost for ourselves.

How does this relate to the situation of companies as employers? If company representatives are faced with people in desperate need of regular income, can they be said to have a duty of assistance towards them?

As was mentioned before, positive duties of assistance imply the complication that it is often rather unclear upon whom they fall. In the desert case, there is obviously only one person who is able to help, so the duty of assistance falls squarely onto him. But in the case of a company operating in an area with many unemployed, desperate people, this is far less clear. First, *helping* destitute people is clearly not the function or role of companies – contrary to charities their legitimate primary function is not to *help* anybody but to generate a profit, in the process of fulfilling an existing demand and generating jobs. Second, translating the desert scenario 1:1 to the company case would also imply that a company should not offer desperate people jobs because this would amount to an exchange transaction. Conversely, the prospective responsibility and accordingly the duty of assistance towards destitute people lie not with firms, but rather first and foremost with their respective *state*.

I accordingly conclude that companies which are confronted with people in desperate need searching for employment cannot be said to stand under an absolute duty of assistance towards them – in other words, they don't stand under a duty to offer them employment. However, we must keep in mind that the situation of people in desperate need is one that *does* generate duties of assistance on the part of others, so it might be that they just take another form when companies are

confronted with people in desperate need looking for employment, or that this has consequences of another sort for the situation we are interested in (more on this in the next paragraph).

(P3) The third premise is clearly crucial for our question, and we will look at its plausibility and ways to attack it in detail.

For attacking (P3) it is crucial that we distinguish between the axiological ranking of *states of affairs* and the deontic moral ranking of *actions*. (P3) might be correct regarding the former but not regarding the moral judgement of the actions of companies. The point is that companies seem to have a third option besides non-interaction and exploitative interaction, namely fair interaction. Consider Wertheimer's example *Housekeeper*:

Housekeeper. A employs B as a full-time housekeeper for a minimum wage. B does not earn enough to live adequately. B has no other job opportunities and would be worse off if she were not employed by A.

In principle, A has at least 3 options: (1) not hire B and do the housework herself, (2) hire B for the minimum wage, (3) hire B for a living wage (or a higher wage). Faced with all three options, A chooses (2), which is better for B than (1) but worse than (3). "But if the relevant set of moral principles presents A with a choice that is limited to (1) and (3), A is likely to choose (3) which is better for B than (2). If we say that (2) is wrong, thereby taking it off the moral table, then the expected result for B is *not* worse for B, given a sufficient likelihood that A will choose (3) rather than (1)" (Wertheimer 2011, 307). The argument is accordingly a conditional one: *if* companies are able to choose this third option, that is, if they have the option to change the unfair component of the overall beneficial "package deal" they offer potential employees, then they should presumably do so.

In our case, the argument rests on the assumption that companies have the *option* to offer fair transactions and will generally want to continue employing people in developing countries, and so condemning unfair transactions will generally work to the benefit of workers in developing countries (cf. *ibid*). If, on the other hand, it could be shown that companies simply *cannot* offer fair or decent transactions without becoming uncompetitive and eventually having to close down, resulting in a worse situation for workers in developing countries, then offering unfair but mutually beneficial transactions would be the preferable option.

With regard to this question it is often claimed that companies are just reacting to the inherent necessities of the market and their actions are effectively entirely determined by the forces of the market. What happens is simply the market at work – individual firms cannot set prices, they are price takers like every other market participant, nor can they change market processes. In this sense it is argued that companies don't actually have other options open to them besides the ones

that contribute to bad working conditions and below-subsistence pay. If they want to stay competitive, so the claim, they have to produce as cheaply as possible and accept short-time deliveries leading to overtime work, since otherwise they would be at a comparative disadvantage with regard to the other competitors, eventually resulting in their inability to stay in the market. Since they cannot change anything, firms cannot be morally responsible to do so either, in line with the principle *ought implies can*. Their actions are accordingly to be seen as ethically *neutral*.

Although the problem of the comparative disadvantage of businesses with higher social (and ecological) standards is to be taken serious and solutions have to be found, it isn't *in general* a convincing argument for the claim that companies don't have the opportunity to pay living wages. This would only be so if company action were inescapably determined by the market – which is obviously wrong. Companies usually do have a certain action range open to them, even under the presumption that they have to try to stay in the market. How exactly this should be judged is highly context dependent. As I said, my point here is conditional: *if* a company has the option to offer a fair exchange (which is perfectly possible) it should presumably do so.

This argument rests on the assumption that it is in principle possible that a transaction which is mutually beneficial and accordingly not wrong by virtue of being *harmful* might nevertheless be wrong by virtue of being *unfair*. But how could it be justified that even though we don't have a duty to interact *at all*, we nevertheless can have a duty to *interact in a certain way* (fairly or un-exploitatively) *if* we decide to interact?

The intuitive answer seems to be the claim that *if* an exchange transaction takes place this generates *special duties* on the part of the people involved to a fair outcome of the transaction. We have encountered this claim before in the section on duties of special relations with regard to beneficial interactions: the *Interaction-Principle*. Let's quickly recapitulate what it says and apply it to economic exchanges.

The Interaction-Principle (IP) holds that “one has special responsibilities to those with whom one interacts beneficially that one would not have if one had chosen not to interact with them” (Wertheimer, cited in: Zwolinski 2007, 708). According to one view of the moral foundations of the duty to avoid beneficial exploitation, trade creates *special associative* duties for its participants. In cases where A has no obligation to interact beneficially with B, *if* he hires B (or somebody else) to mow his lawn and thereby benefits from B's labor, there is a minimum level of benefits that B should receive – namely a *fair* one, which lies possibly *above* the contractual level of benefits that A and B negotiated. In this sense, IP holds that “one can have obligations or moral reasons to provide *super-contractual* benefits to those with whom one engages in mutually beneficial and consensual transactions” (ibid., 256), i.e. those that are necessary to make the terms of the transaction *fair*. As we said in Part I, IP rests on (or to be an expression of) the norm of positive reciprocity, which holds essentially that someone who benefits from the beneficial actions of others is

morally required to *reciprocate* by equally beneficial actions. But it is not enough to refer to the principle of reciprocity to argue that employers have super-contractual obligations to employees, since the question is precisely what exactly this *amounts to*. After all, it could be argued that the benefits provided by the employer already fulfil the requirements of reciprocity (cf. Wertheimer 2011, 269). In other words: the Interaction-Principle demands a fair or just outcome of transactions in the context of economic exchanges. But what does this imply?

An intuitively attractive idea is that the exchanged goods or services should be of *equal value*. We discussed this possibility in chapter 3.8 under the heading of *iustitia commutativa* and reached the conclusion that this is more complicated than it first looks. An intuitively compelling view might be that the exploiter's gain is disproportionate compared to the gain of the exploitee with regard to the non-transaction-baseline. But this cannot be right. Leaving aside the case where A might have a bigger claim to the benefits of the transaction from previous actions, if we measure just the gain each has from the transaction in terms of marginal utility, the exploitee's is usually *much higher* than the exploiter's gain. Consider a case with relevance for our context: Company A proposes to hire B for below-subsistence pay. If B accepts, this is presumable precisely because he *desperately needs* the regular income (even though it is very low). The company on the other hand could easily hire somebody else instead. In this situation then, the marginal utility from the transaction is much higher for B than for A. As a matter of fact, it is the fact that B has so much to lose that gives A an immense advantage in bargaining power over B (more on this below).

Accordingly, we would have to assess the relative gains with regard to a *normative* as opposed to a non-transaction-baseline. Our discussion in Part I suggested that in some cases (primarily monopolies), the value could be assessed in terms of the normative baseline of the market price in a hypothetical ideal market. This means that in the case of monopolies a just or fair transaction outcome could be determined by asking what outcome "would be agreed to by rational informed bargainers in a competitive market environment or what we sometimes call 'fair market value'" (Wertheimer 2011, 209).

However, as we argued there this market economy interpretation does not capture all there is about our moral intuitions concerning the possible substantive unfairness or injustice of transactions. The example relevant in our context we mentioned was a transaction where a worker in a developing country supplies work to a company which is perfectly happy with the supplied work, makes a good profit but, the market price of unskilled labor in the region being very low because of high unemployment, doesn't even pay the worker enough for subsistence in return. As we said there, this still seems to be exploitative, even if the market price is paid.

How else could we then understand the normative baseline of fair transaction outcomes?

Mayer proposes the following normative baseline ("just price") for a just transaction outcome for a transaction: "Some initial disadvantage renders an agent exploitable. To calculate the just price in any given case, we simply imagine the same transaction without the initial disadvantage. The just

price is thus the price which a non-disadvantaged party would accept or pay" (Mayer 2007, 145).

This is a very interesting suggestion. According to it, the exploitee is always disadvantaged in some sense, which leads him to accept an exploitative offer in the first place (ibid., 143). This disadvantage plays out in severely reduced bargaining power, which is "corrected" by the hypothetical scenario of imagining what he would accept without the disadvantage.

Mayer's suggestion interestingly combines the outcome dimension of transactions with the background dimension (one party being disadvantaged at the outset) and the procedural dimension (the other party taking unfair advantage of this circumstance). The disadvantaging background conditions are enabling conditions for the exploitation, the process dimension is constituted by an action of unfair bargaining by the exploiter in that it takes advantage of the severely reduced bargaining power of the exploitee, and combined they lead to an unjust transaction outcome.

This suggestion can be interpreted straightforwardly in terms of the understanding of fairness we suggested. Fairness, we argued, requires that no party is disadvantaged with regard to the aim of the practice (in the case of bargaining, finding an agreement which is acceptable to all parties, or calling the deal off), and that there is no taking advantage of existing disadvantages in the background conditions. If the background conditions of the bargaining process severely disadvantage one party, the relevant equality of opportunity of the parties in reaching this agreement is jeopardized. Our account can accordingly capture the structure of exploitation according to Mayer well.

But let us examine the procedural dimension of beneficially exploitative transactions in more detail to get a better understanding of what the exact problem is, and how it is connected to the background conditions. We will do this by analyzing the second argument for the claim that there is actually nothing wrong at all with beneficial exploitation, which focuses on the procedural dimension of transactions. In the course of our discussion we will come back full circle to the above account of exploitation with a deeper understanding thereof.

7.4.2.5.2 The "*volenti non fit iniuria*" argument

The second line of argument, which is often called the "*volenti non fit iniuria*" argument, focuses on the process of transactions, namely people's voluntary consent to economic transactions and its legitimizing role. It holds that transactions in free markets are based on contracts which require the voluntary consent of both parties, and accordingly their outcome cannot be morally wrong or unfair. In this sense e.g. Ian Maitland argues that "the appropriate test [for fair wages] is not whether the wage reaches some predetermined standard but whether it is freely accepted by (reasonably) informed workers" (Maitland 1997, 603).

There are two different versions of the "*volenti non fit iniuria*"-argument in the context of free market transactions: an economic-descriptive version, and a normative version.

The economic-descriptive version of the "*volenti non fit iniuria*"-argument reiterates the

understanding of voluntary beneficial transactions of economic theory: as we saw earlier, in economic theory preference orderings are derived from the choices people make. This means that we can *see* people's preferences in their choices: if someone consents to a transaction, this implies (descriptively) that she believes the transaction makes her better off (i.e. improves her preference satisfaction), since as a rational actor she would not consent to the transactions otherwise. The role of consent then is merely that it functions as evidence for the advantageousness of the transaction. Accordingly, the economic-descriptive version of the "volenti non fit iniuria"-argument cannot serve as a normative argument against (P1).

The normative version of the "volenti non fit iniuria"-claim in the context of free market transactions by contrast focuses on the transformative moral force of consent: valid consent can make actions that would be morally prohibited become morally acceptable. This moral force can on the one hand be based on the right of every individual to decide over her private issues – in the words of Mill: "Over himself, over his own body and mind, the individual is sovereign" (Mill 2009, 32). Alternatively it can be based on the Kantian practical imperative according to which one should never use a person as a mere means but always as an end in himself. To request consent guarantees that we treat our exchange partners as autonomous persons and by this in Kant's sense as an end in themselves (cf. e.g. O'Neill 1986, 44).

According to this understanding, as soon as there is valid consent to a transaction it is legitimate – whatever action it consists of and whatever consequences may result from it. This however is a very strong claim. *Just how* strong it is depends on what counts as the *conditions* of valid consent. The main conditions are usually considered to be that consent is informed and voluntary. Calling into question the legitimizing force of "*voluntary consent*" to transactions where people consent to exploitative work agreements accordingly amounts to arguing that one of the conditions were not met.

A first issue in our context concerns situations where people lack full *information* about the consequences of a choice (e.g. to leave a poor rural area for factory work in a far- away industrial center), and accordingly can't make a fully informed choice. A second issue is that such labor choices, once made, sometimes effectively can't be undone anymore once additional information is learned "on the job" (e.g. it can become close to impossible to get out of a work agreement and return to one's rural home).

A third issue – the most interesting from an ethical perspective – are situations where the voluntariness of people's consent is questionable. It concerns situations where people basically "have no other choice" but to accept a certain bad option (or job in our case). If we have the intuition that there *is* something wrong with transactions like in "Lecherous millionaire" and "Belo-subsistence wage" *even if* the transaction partners give factual consent to the terms of the transactions, this is presumably because the consent is not "voluntary" in the normatively transformative sense.

1) Can offers be coercive?

In the situations we are interested in, companies make a conditional offer along the following lines: we offer you this job at the specified (bad) conditions, take it or leave it and suffer the consequences. Since under certain circumstances, offers for such exploitative labor exchanges seem to leave the exploitee *no choice* but to accept them, we might think that these offers themselves are *coercive* in the sense of undermining the normatively legitimating force of people's consent to them (i.e. their outcome). If they were, they would be prohibited by the duty not to use coercion and we would have a good prima facie reason to prohibit them. In this sense we can ask the following question: is it morally wrong of MNEs to offer a job to bad conditions because such offers are coercive? Let us consider how it could be argued in favor of this claim.

A possible approach that Zuber (2010) explores consists in drawing an analogy between coercive threats (like the one in the robber example) and coercive offers. This analogy can be exemplified drastically in the following way: “‘Your money or your life’ might equally be proposed by a backalley robber or a pharmaceutical company; in one case it's a robbery, in the other case it may be a life-saving offer.”¹⁰² As this example illustrates, the basic structure of conditional threats and conditional offers is very similar. In the case of conditional threats, it looks as follows: A (the person making the conditional threat) attaches some undesirable consequences C to a certain action Q undertaken by B (ibid.): A claims that A will bring about consequences C if and only if B does Q. In the robbery example, A is the robber, B is the victim, C is the action of killing B, and Q is the action of not handing over his wallet. This “proposition has the same structure as an ordinary (conditional) offer by A to do something B desires if and only if B agrees to pay for it” (Zuber 2010, 45; cf. Anderson 2006): A claims that A will bring about consequences C (something B desires) if and only if B does Q (pays for it).

However, there is usually seen to be a crucial difference between conditional threats and conditional offers: the fact that threats propose to make their recipients *worse off* than they would have been otherwise, while offers usually propose to make their recipients *better off* than they would have been otherwise (or at least not worse). Offering someone to make him better off on the other hand doesn't restrict his options like coercing someone does, but quite to the contrary, it *gives* him an additional option. In the words of Wertheimer, „Whereas threats reduce the options available to the target, offers expand the options, and one does not coerce another when one's proposal expands rather than contracts the agent's options“ (Wertheimer et al. 2008, 390). How indeed should giving someone an additional option be bad? This is of course the conventional argument by people legitimizing sweatshop labor. And in fact, it is not easy to refute.

Joel Feinberg, who was one of the few philosophers arguing in favor of the possibility of

¹⁰² Cf: Anderson 2006.

coercive offers, argues that both the coerciveness and the offer-likeness are present in the case in question: “They are offers because the proposer does not threaten any harm beyond what would happen anyway without his gratuitous intervention,” and because they increase the number of options available to the person. But at the same time, “They appear to be coercive in that they rearrange a person’s options in such a way that he has ‘no choice’ but to comply or else suffer an unacceptable consequence”(Feinberg 1986, 230).

How is having “no choice” to be understood here? Feinberg gives his answer when he adds that “Typically,[coercive offers] force a choice between evils”, (Feinberg 1986, 235) and that in this situation, the lesser evil becomes the only option because it is the exclusive alternative to an intolerable evil. In this situation, we could try to argue, consent to the offered (bad) option could be seen as insufficient for the outcome of the transaction to qualify as morally justified. Although most authors are not convinced by this argument, I consider it to be promising and will explore it in more detail below.

There is yet another perspective on the problem. As we said before, what is commonly thought to distinguish conditional offers from conditional threats is that the former propose to make the recipient better off, while the latter propose to make their recipients worse off. Now, making someone “worse off” can be understood as *harming* him, i.e. making him worse off than before the transaction (relative to a *descriptive* baseline), but it can also be understood in terms of the *violation of his rights, negative* or, importantly, *positive*, accordingly making him worse off compared to a *normative* baseline. Wertheimer operates with the latter understanding in his definition of coercion: “A coerces B to do X only if (1) A proposes or threatens to violate B’s rights or not fulfill an obligation to B if B chooses not to do x and (2) B has no reasonable alternative but to accept A’s proposal” (Wertheimer et al. 2008, 390).

This perspective can account for our common understanding in two specific cases:

a) The case where A makes B worse off, but has a right to do so, and by this does not violate B’s rights, which is commonly not understood as implying coercion. An example would be economic actor A asking economic actor B to cooperate with him or else A will start selling his products at a better price than B and thereby possibly drive A out of the market. Since we commonly understand economic competition as legitimate and accordingly think B has no right not to have to compete against A, the behavior of A is not sensibly understood as an attempt at coercion, but as a genuine offer.

b) The case where A has some obligation to render B better off than B’s status quo. An example would be B qualifying for social benefits, and accordingly having a right to it, and A, who is a government official in the social benefits department, offering (threatening) to initiate payments to B only if B pays him privately a certain sum of money. This would count as coercive since A is violating B’s right to social benefit money, although A does not propose to make B *worse off* than his status quo

(without the social benefit money). If B has a right to something, attaching additional conditions amounts to coercion.

Zuber proposes to transfer this to the question of coercive offers. She argues that the latter could be understood as offers (threats) of an option which would make B better off, but would fail to benefit B enough, compared to A's obligation. If B has a right to be made better off according to a certain normative standard, not to fulfill this obligation then would be comparable to taking away an option B has a right to (cf. Zuber 2010, 47¹⁰³). In this sense, we could try to argue that in cases where companies offer potential workers bad working conditions and below subsistence wages, they are violating their obligation by violating the workers' right – a right to a living wage. Are we justified to believe those persons to have such a right?

Working conditions that respect negative human rights are clearly something that people have a claim to. But as we saw in Part I, positive rights in general are highly disputed. The right to subsistence is certainly among the least contested positive rights. However, in the case of below subsistence wages it is not clear why it should fall *on the employer* to fulfill this right – rather than the state. In this sense, Wertheimer argues that if the worker's right is not fulfilled because he lives in a context with unjust background conditions, it doesn't follow that the worker has a right that his *employer* ensures her subsistence (cf. Wertheimer 2011, 212).

Let us therefore approach the question of the procedural unfairness of beneficial, consensual exploitation from another, related perspective and see what it contributes to our understanding.

2) Can circumstances undermine the normative force of consent to a transaction?

To capture our intuition that the decision of workers to continue working under terrible conditions is not to be understood as voluntary consent to their working conditions in a normatively relevant sense, we need to broaden our understanding of the conditions of normatively relevant consent to a transaction. More specifically, we need to broaden them *beyond* economic theory's weak definition of voluntariness as the absence of active, man-made coercion, in such a way as to capture the effect of circumstances on people's freedom of decision making (cf. Zuber 2010).

Conceptually, there are two ways to argue for the claim that circumstances can indeed be such as to undermine the legitimizing force of people's consent to a certain option or transaction.

1) The first line of argument which is taken by Zwolinski (2007) and Radcliffe-Richards (1998), still takes the conditions for voluntary consent to be the absence of coercion and fraud, but broadens the understanding of the concept of *coercion* to include certain "coercive circumstances". Following this approach one then needs to argue for the claim that *man-made coercion and the coercive effect of circumstances are analogous in the morally relevant respect*.

¹⁰³ For a similar reasoning see Sample 2003, 20f.

2) The second line of argument understands non-coerciveness (understood in the traditional way) as a necessary but not a sufficient condition for normatively relevant voluntariness, hereby broadening our understanding of the concept of *voluntariness* to include more than just the absence of coercion and fraud (cf. Zuber 2010, 41). Following this approach one then has to justify a) the claim *that* additional conditions are needed, and b) which ones they are.

So, let us examine if the effect of certain circumstances can be coercive like man-made coercion.

Consider first the case of coercive human actions, and among them specifically coercive threats. If a robber tells his victim: “Your live or your money” this translates as: “If you don’t give me your money I will kill you”. This conditional statement literally seems to give the victim a choice: he can either hand over his money or die. But this perspective clearly misses the point: actually, the robber *threatens* the victim that he will bring about a completely unacceptable option (losing his life) if the victim does not do what he wants. In cases like this we speak of people *being forced* to do something, and conditional statements of the above sort are called “coercive threats”. The fact that the threat can be formulated as a choice obviously does not make it appropriate to say that the victim hands over his wallet “voluntarily” or gives his “voluntary consent” to this action in any normatively relevant sense. But why exactly is this?

The reason is that the victim chooses the option of handing over his money only because the alternative (death) is completely unacceptable in absolute terms. In other words, since one of the two options is extremely bad, he rationally has to accept the only other option left to him, even if it is bad as well. Formulated generally, if a person has the choice only between evils and chooses the least bad one among them, this is only proof of his *rationality* and not of his morally relevant *consent* to the option.

When people say “I had no choice but to take the job”, or “I had no choice but to accept their demands” this suggests that they also felt *forced* to take a certain decision. The perceived coercive effect of certain circumstances is similar to coercive human actions in that they both severely restrict the options available to someone and, *leaving them with only bad options in absolute terms*. In this sense, we could translate the statement “I had no choice but to do x” to “under the circumstances, the alternative options to the one I chose were all so *bad or unacceptable in absolute terms* that I rationally had no choice but to choose the least evil option x” – which is analogous to the robbery example above. In this sense one could say that the people in question were somehow *forced by the circumstances* to take the decision they took because their situation left them with no acceptable alternative options, and so they chose the option for rational reasons only.

Severe poverty is such a circumstance that drastically reduces people’s options to possibly only a few bad ones, and might accordingly be understood as being coercive. One author who states this claim is Matt Zwolinski, when he writes: “Poverty can be regarded as coercive because it, too, reduces our options. Poverty reduces the options of many sweatshop workers, for instance, to a small

list of poor options – prostitution, theft, sweatshop labor, or starvation” (Zwolinski 2007, 701). Janet Radcliffe-Richards completes this thought when she writes “It is (...) claimed that, since they are coerced by their economic circumstances, their consent cannot count as genuine” (Radcliffe-Richards et al. 1998, 1950). The complete claim then is that a situation where the range of someone’s options is reduced to only bad ones in absolute terms can undermine the moral weight of the consent people give to transactions. It seems plausible then to broaden our understanding of the conditions of normatively relevant consent to a transaction *beyond* economic theory’s weak definition of voluntariness to include coercive circumstances as well. Let us now come to the question which additional conditions need to be met for consent to an option to count as morally valid. There are mainly two candidates that come to mind. The first concerns p) the *quantity* of options available, while the second concerns q) the *quality* of the options available. Formulated as conditions for voluntary consent, they could be spelled out as p) having a certain minimum *number* of options from which to choose, and q) as having one or more *acceptable* options in absolute terms (quality) available.

Let’s start with p). First, note that clearly not every limitation of options by itself undermines the normative force of consent to an option. As a matter of fact, people’s options are limited in many ways in *all* decisions they take, but we would nevertheless consider consent to them normatively valid in many cases. As such, a person in an industrialized country’s options as to what job to take are limited by their education, their abilities, their place of residence, the demand on the job market, etc. Nevertheless, we would hardly consider someone’s decision for a certain job in this situation as non-voluntary in the sense of undermining the moral weight of their consent. Maybe then a certain *minimal* number of options is necessary for consent to a transaction to be voluntary in a morally relevant sense?

Comparing Zwolinski’s example with another one will serve to explore this possibility: consider Zwolinski’s case where person A has the options of prostitution, theft, sweatshop labor, or starvation (four options) and the case where person B has the options of either a well-paid job as a factory worker or an equally well paid job as a vendor in a shop (2 options). Surely B’s consent to one of his two options seems intuitively rather unproblematic, while A’s consent to one of his four options seems very problematic. Does this suggest that what is crucial for the normative weight of consent might not be the quantity of the options but their *quality*?

Before exploring this option further, let me mention that there is a certain (rather trivial) *connection* between the quality and the quantity of options available to someone.

Looking again at the example just mentioned, note that it just *looks* as if the person had only two options. Of course, theoretically, he additionally *also* has the options of person A – it is just that having good options he won’t have to consider these options of last resort. In this sense, the overall number of options is always higher when it contains good options in addition to the options of last

resort. This might account for our intuition that the number of options *is* relevant for the normal weight of consent in some way.

The relevance of the quality of other available options is that the criterion of the mutual advantageousness of a transaction concerns the quality of a given transaction *relative to no transaction at all*. If no transaction implies e.g. starvation, then more or less *any* transaction is more advantageous than that and accordingly fulfills the economic criterion – even horrible ones in an absolute sense, including prostitution, selling an organ, selling one's child, or selling oneself into slavery. Considering such examples where the alternatives to a certain transaction are sufficiently bad shows that the criterion of mutual advantageousness is extremely weak – possibly so weak as to be morally completely irrelevant. Since the economic criterion of mutual advantageousness is intrinsically linked to the criterion of voluntary consent to a transaction – as we saw before, the assumption that a certain transaction is beneficial to both parties in terms of subjective preference satisfaction is *derived* from the assumption that the (rational) parties voluntarily consent to it – this matches the extremely weak moral relevance or even insignificance of the economic criterion of voluntary consent, which is then merely the freedom to make a rational decision.

Coming back to the relevance of the quality of options for the normative weight of consent, consider the case where a person C has the bad options mentioned by Zwolinski, prostitution, theft, sweatshop labor, or starvation, but *also* one option that is good in absolute terms, say, employment to good conditions. Now the consent of C to the one good option he has would usually intuitively be considered to be morally unproblematic. This is still the case where some person D has only two options – say, starvation or employment to good conditions. This suggests that b), having one or more *good* options in absolute terms (quality) available, might be a *sufficient* condition for morally legitimating voluntary consent, while a) is not crucial in itself. Tentatively we could say then that if a person has at least one option open to them that is acceptable in absolute terms, this is sufficient to make their consent to the respective transaction morally valid. Conversely, we could say that if a person has no option open to them which is acceptable in an absolute sense, this would make their consent to any of the unacceptable options morally invalid.

From what has been said in the last sections we can conclude that circumstances can be seen as undermining the moral relevance of consent to a certain transaction in that they can be such as to make it rational to choose any morally horrible option. The main problem from a moral point of view then is the absolute moral badness of the options per se. It is plausible to argue that below-living wages constitute such morally bad options in absolute terms – for example from the position of Scanlons contractualism (1998).

3) The argument from treating others as equals for blocking exchanges born of desperation

A similar conclusion, namely that exchanges born of desperation should be considered immoral and should actually be blocked, is reached via a different route of argument by some authors. According to Okun (1975) for example, exchanges born of desperation should be blocked as part of limiting the dominance of wealth (ibid., 20; cf. Walzer 1983, 100). Okun, who draws a line between the sphere of money and the sphere of rights, argues that due to this limitation of the sphere of wealth by the sphere of rights, human beings and their liberty cannot be sold, and neither can a person sell himself as a slave. What goes on in the market should never compromise the normative fact from the sphere of rights that people are equals. On the basis of the same rationale, "(...) what goes on in the market should at least approximate an exchange between equals (a free exchange). These last words don't mean that every commodity will sell for a „just price“ or that every worker will receive his 'just reward'. Justice of that sort is alien to the market. But every exchange must be the result of a bargain, not of a command or an ultimatum. If the market is to work properly, 'exchanges born of desperation' must be ruled out, for necessity, as Ben Franklin wrote, 'never made a good bargain'. In a sense, the welfare state underwrites the sphere of money when it guarantees that men and women will never be forced to bargain without resources for the very means of life. When the state acts to facilitate union organization, it serves the same purpose. Workers who stand alone are liable to be forced into trades of last resort, driven by their poverty, or their lack of particular marketable skills, or their inability to move their families to accept the ultimatum of some local employer. Collective bargaining is more likely to be an exchange between equals. It doesn't guarantee a good bargain (...), but it helps to sustain the integrity of the market" (Walzer 1983, 120f).

This comes again very close to our understanding of the requirements of fairness. The practice of bargaining is understood as standing under the rationale of *finding an agreement* of some sort, as opposed to "a command or an ultimatum". An exchange "should at least approximate an exchange between equals", that is, it is measured against a presumption of equality, and accordingly requires a rough equality of opportunity in the practice of bargaining.

In this sense, Walzer argues that the blocking of desperate exchanges and the fostering of trade unions serves a more equitable distribution of market power (ibid., 122). "The eight-hour day, minimum wage laws, health and safety regulations: all these set a floor, establish basic standards, below which workers cannot bid against one another for employment. (...) This is a restraint of market liberty, a reassertion, at lower levels of loss, of the ban on slavery" (Walzer 1983, 102).

What does this mean with regard to the situation of workers in developing countries where the state does not guarantee through a social safety net that the workers "will never be forced to bargain without resources for the very means of life" (Walzer 1983, 120f)? As I see it, accepting our exchange partner as an equal implies treating him in a negotiation *as if* he had a viable other option,

that is in our case an option to *at least* secure the resources for his survival, which would guarantee him sufficient bargaining power to make the negotiation a case of bargaining at all. In this counterfactual situation, he would *not* agree to any deal that left him with a below-subsistence wage. In this sense, the minimum we have to offer if we want to treat our potential exchange partner as an equal is a living wage. Unless that is, if we seriously *cannot afford* paying that wage (according to *ought implies can*).

In other words, we can argue that there is a duty on the part of B not to take advantage of the power the desperate situation of A gives him regarding the determination of the terms of the transaction. This claim is based on the recognition that the fact a desperate person has everything to lose makes them utterly powerless in a “negotiation” about the terms of the transaction. Just as in the desert case, they would accept almost *any working conditions* set by a potential employer in an (more or less) exclusive position to “help” them. Respecting people as equals demands that B does not take advantage of this extreme power imbalance to strike a deal for maximum profit – although he could. Rather, it implies abstracting from the powerlessness of the transaction party and offering him a fair deal anyway – one that he could accept if he were not in a situation of desperate need: an acceptable offer in absolute terms.

And here we are, back full circle to the account of exploitation by Mayer: “Some initial disadvantage renders an agent exploitable. To calculate the just price in any given case, we simply imagine the same transaction without the initial disadvantage. The just price is thus the price which a non-disadvantaged party would accept or pay” (Mayer 2007, 145).

Should beneficial, consensual exploitative transactions of companies be legally prohibited?

Should we argue that beneficial, consensual exploitative transactions in the supply chains of MNEs (particularly below-subsistence wages) should be *legally* prohibited or regulated?

Note that we need to clearly distinguish between the ethics of transactions and the ethics of interference. From what has been said above it does *not* follow that beneficial, consensual exploitation should be *prohibited or regulated* in current reality.

Wertheimer argues against such prohibition or regulation for the following reason from the perspective of the individual: “Given the non-ideal background conditions under which people find themselves, there should be a very strong presumption in favor of principles that would allow people to improve their situations if they give appropriately robust consent and if doing so has no negative effects on others” (Wertheimer 2011, 223). For this reason, Wertheimer argues that allowing beneficial-consensual exploitation (including paying below-subsistence wages) is a plausible principle of non-ideal moral theory.

Above that, our assessment of the question if beneficial, consensual exploitation in the supply chains of MNEs should be allowed, all things considered, will depend to a significant extent on the

consequences that such a prohibition would have for the ones affected by it. So let us have a look at this question.

One might think that contrary to the above example *Housekeeper*, companies cannot choose *not* to employ any workers because someone *has* to produce the products they want to sell. Accordingly they *have to* choose option (3) over (1) and the workers will be better off as a consequence since they are paid a living wage. If this were the case, this would be a weighty reason to prohibit below-subsistence pay.

However, as we saw before, requiring companies to pay living wages may have the consequence that they can employ *less* people than they otherwise would. Those workers whose marginal productivity is below the threshold of a living wage would simply not be employed in this case (it is an empirical question how many workers this would concern). In any case, this would have to be weighed against the benefit for the workers who newly receive a living wage.

But there is more. Note that the above argument regarding *Housekeeper* rests on the premise that companies cannot choose *not* to employ any workers because someone *has* to produce the products they want to sell. But this doesn't take into account that companies might have the option to automatize the respective production processes (which would be the equivalent to (1) above). Whether this premise is plausible depends on *empirical* issues like the technical feasibility of automatizing the relevant processes, and the access to capital necessary for such automation. Regarding the vast means available to MNEs and today's technical possibilities it seems clear that these obstacles to automation can be overcome.

On this background, we might need to reassess the situation: a substantial raise in labor costs might critically raise the incentive for MNEs to invest in technological solutions for automatizing their production processes – and proportionally raise the probability of option (1) being picked by MNEs, in which case they would no longer need a tremendous number of people currently working in their supply chains.

Considering the speed of technological change, I believe that the latter is a very real option – to happen sooner or later, depending on the circumstances. We therefore need to consider the following two questions: a) would the raise in labor costs due to paying living wages be big enough to prompt MNEs to automatize their processes? And b) if they did, what would be the consequences for workers in developing countries?

Ad a) As we saw before, in terms of the additional cost of, say, a t-shirt, the raise in production costs due to living wages seems to be rather small. However, if we consider the raise in labor costs for MNEs, the picture looks different: according to estimates, their labor costs would be raised by 30-45% (Starmanns 2011, 195f). I don't have the necessary figures to assess if this is enough (over time) to make a shift to automation worthwhile. But MNEs can be relied on to do the math. What I am saying is merely conditional: *if* the increase in labor costs due to living wages

makes this shift profitable, *then* we need to very carefully assess the consequences this would have for people in developing countries and include this in our ethical assessment of the desirability of such measures. Since, while we *might* be able to prohibit companies to pay below-subsistence wages, we *cannot* prohibit them to automatize their production.

Ad b) As I said, without being an expert on the matter, it seems very plausible to assume that sooner or later the currently manufacturing-based production processes in the supply chains of MNEs will be substituted by primarily automatized production processes. But what implications would this have for the people affected?

Let us take a short look at the – extremely simplified – history of automation in Europe. In Europe this process was (and actually still is) gradual, starting with early industrialization and picking up tremendous speed in the last 30 years or so. During this development, social conditions changed gradually to accommodate the new need for different kinds of labor – from low-skilled manufacturing work to high-skilled work related to machines. The need for high-skilled workers for this different kind of labor led to a demand for better education. People equipped with this education found new jobs, goods were being produced much cheaper without manual labor, and the new technologies freed up tremendous amounts of time (think of washing machines etc.), especially for women. All in all, this development led to massive raises in living standards over a rather short period of time.

Since the development was gradual, there was no catastrophic place in time when a large majority was all of a sudden out of a job. But what would be the consequences if MNEs shifted to automated forms of production in the course of a few years? Would they shift back production to industrialized countries, or would they establish their new automated plants in developing countries? What would the effects of all this be on developing and on industrialized countries?

Even if a gradual shift to automation with automated production facilities being established in developing countries could have beneficial consequences (as they had in Europe), a sudden shift would presumably have dramatic effects for workers and developing countries in general, since they have become highly dependent on being part of the supply chains of MNEs. Much would depend on how well people in developing countries would be prepared for such eventual changes.

Conclusions on (P1)

Our discussion of (P1) showed that, while the truth of (P1) is uncontroversial regarding harmful, non-consensual exploitation, it is much more difficult to justify that it is also true regarding beneficial, consensual exploitation. Nevertheless, we showed that there are plausible reasons for thinking that it is indeed morally blameworthy of a company to exploit others in a beneficial, consensual way. We argued that it is blameworthy of companies to offer unfair working deals *in cases where* they could offer fair ones. Further, we argued that the claim to a living wage (directed at companies) could be based on a demanding understanding of voluntary consent and the claim that it is wrong to make people choose between “evils” (i.e. bad options in absolute terms). As I said, if a person has

the choice only between evils and chooses the least bad one among them, this is only proof of his *rationality* and not of his morally relevant *consent* to the option.

Further, we argued that under just background conditions systematic beneficial labor exploitation would not occur since people would have their subsistence and basic needs secured and would accordingly never have to bargain from a position of desperation (and according powerlessness). In practice, the powerlessness of workers can be mitigated through the possibility of collective bargaining

On the other hand, we argued that it could be very risky to legally enforce e.g. living wages since this might indeed *worsen* the situation of many people in developing countries. This conclusion is widely shared with regard to beneficial exploitation in general.¹⁰⁴ In the sense of the precautionary principle we might possibly consider the current practice of governments in developing countries as being justified. It seems then that we would have to search for alternative solutions to lessen the plight of people working for below-subsistence wages. It might be more plausible to argue that yes, we think that everybody who works full time should earn a living wage, but that the costs for this should be carried by collective institutions instead of the employers alone. In this model, employers would be allowed to pay market wages and the collective institutions would supplement the wage (though specific policies similar to the Earned Income Tax Credit in the US) to bring the employee's net income up to the required level (cf. Wertheimer 2011, 287).

Let us now turn to premise 2), which is concerned with the responsibility of *MNEs* for exploitative transactions in their supply chains.

7.4.2 (P2) If there are Exploitative Transactions in the Supply Chains of an MNE, the MNE is Responsible for them

The assumption that *if* there are exploitative transactions in the supply chains of MNEs the latter are *responsible* for them is of course a very different claim from the one that exploitation is wrong. After all, as we saw, it is usually not the MNEs directly who exploit their *own* workers, but other firms who merely supply MNEs with goods or services.

In some authors' view, the factors leading to the situation where workers in the supply chains of MNEs are being exploited is so complex that ascription of responsibility to individual actors (be it the factory owners, MNEs or others) is generally mistaken. In Iris Marion Young's (2004, 2006) view, the problem of bad working conditions in the supply chain of MNEs is a problem of "structural injustice". This implies that causality is not clear-cut and there are many actors simultaneously contributing to poor working conditions. The latter are accordingly the mediated result of complex global structures into which different actors are embedded and to which they all contribute. While consumers are generally shocked about sweatshop working conditions, when

¹⁰⁴ See e.g. Radcliffe Richards et al. 1998; Wertheimer 1999; Zwolinski 2007.

making purchasing decisions most of them are nevertheless primarily interested in the design, the functionality and the low price of goods and care little about poor working conditions (cf. Devinney et al. 2010). MNEs provide goods according to these consumer preferences and argue that the legal system in the production countries must deal with ethical requirements. Producers in development countries are interested in getting as many big contracts as possible and don't decline orders that require them to compromise working conditions. Workers on the other hand are dependent on jobs and continue to work even under bad conditions. The governments of developing countries pursue the strategy to attract investment and increase exports while keeping legal requirements for working conditions low because they are competing against other developing countries. The governments are strongly influenced by industry lobbies who keep warning them that MNEs would place their orders in other developing countries if there were higher minimum wages, and that factories would have to shut down and workers be out of any job at all.

Young argues that in this kind of situation it is not possible to blame one single agent for being remedially responsible for bad working conditions. She suggests that various actors share a prospective responsibility and that four criteria determine their share of responsibility: power, privilege, interests and collective ability (Young 2006, 127ff). One of her central points is that background conditions such as the fashion system or market competition need to be challenged. She emphasizes that without addressing these background conditions we will not substantially improve the situation of workers in the supply chains of MNEs.

Young is certainly right that many factors play together in leading to exploitative working conditions in the supply chains of MNEs, and that it is not possible to clearly assign the whole of responsibility to one group of actors.

However, this is not to say that we can say nothing of relevance regarding the particular responsibility of certain actors in that system leading to the exploitation of workers in developing countries. In fact, we can engage with the question of particular actors' responsibility in much more specific ways than Young's approach might suggest. In what follows I want to focus on the group of actors that NGOs and the public consider to be carrying the main responsibility (cf. Starmanns 2010, 7) and analyze the moral grounds of these claims: the MNEs or brands in whose supply chains the exploitation of workers happens.

Whereas it is rather easy to justify that MNEs are responsible for the working conditions in their *own* facilities, it is much more difficult to justify why they should also be responsible for working conditions in their legally independent suppliers.

This point was stressed by MNEs when confronted with the public criticisms with regard to poor working conditions in their supply chains. The following exemplifies the position, prevalent at least until a few years ago among firm owners and managers, that legally independent firms are generally not responsible for each other's actions, and that it is impossible to ascribe responsibility

to an MNE for bad working conditions in its supply chains: confronted with accusations from a journalist about his company being responsible for terrible conditions in a Haitian contracting firm that produced Disney clothes, Disney Spokesman Ken Green replied: “We don’t employ anyone in Haiti. With the newsprint you use, do you have any idea of the labor conditions involved to produce it?” (Majtenyi 1996, 6; cf. Klein 2010, 197f)

Indeed, as the statement suggests, with supply chains having become ever more complex ascriptions of responsibility have become ever more difficult.

However, the public and many authors were unimpressed by this reasoning and insisted that this didn’t absolve the MNEs from their responsibility concerning exploitation and bad working conditions in their supply chains, including in their legally independent suppliers and subcontractors.¹⁰⁵

Starting from this controversy let us then have a closer look at how (P2), the claim that *if there are exploitative transactions in the supply chains of an MNE, the MNE is responsible for them*, could be justified.

7.4.2.1 The social license to operate: empirical-social grounds of MNEs' responsibility for wrongs in their supply chains

As a matter of fact, the mentioned public opinion or social expectation towards MNEs *per se* is often cited as the actual *grounds* for MNE’s responsibility towards the people in their supply chains. Consider for example how the influential *Ruggie-Report* devised on behalf of the UN put it: “...the broader scope of the responsibility [of business] ... is defined by social expectations – as part of what is sometimes called a company’s social licence to operate” (Ruggie 2008, 16f).

This perspective relies on an *empirical-social understanding* of MNE’s responsibilities. In this sense, for example Donaldson/Preston (1995) and Gray et al. (1988) argue that a firm's responsibility (in the sense of accountability) to society is grounded in a social contract between business and society, with business deriving its existence from society. This is thought to give society the right to direct demands to the companies regarding their actions. According to this perspective, to be legitimate companies (including MNEs) have to comply with the expectations or demands which society directs at them.

This perspective is certainly relevant in practice. From the sociological perspective of neo-institutional theories, organizations (including MNEs) adapt to the pressure of their environment to be conceived as legitimate actors (Di Maggio / Powell 1983; Zöllner 2004; cf. Starmanns 2010, 16). And indeed, as a result of the pressure brought about by social expectations, MNEs have started to take on the responsibility the public claimed they had concerning their supply chains. In the last 10-15 years brands and retailers have started to engage in so-called corporate social responsibility (CSR)

¹⁰⁵ See e.g. Mamic 2005.

activities, by which they also try to improve working conditions in their global supply chains. “Today, almost every large company agrees that they have *some* responsibility for working conditions in their supply chains” (Starmanns 2011, 199).

However, they mostly did (and do) so only insofar as they fear reputational problems when not fulfilling the public’s expectations because of their potential negative economic consequences. Based on the same logic business ethics usually tries to argue that there is a “business case” – meaning an *economic* argument – for corporate social responsibility (CSR) measures, including those directed at improving working conditions in supply chains. As Vogel (2005) pointed out, such an economic argument seems to work for some cases, but not for others. Whereas it might be applicable to the most famous brands because of their high visibility and consequent vulnerability to reputational damage, for most other firms it may well not apply.

In any case, while the empirical-social understanding of MNEs’ responsibility for conditions in their supply chains certainly has its merits, it does not resolve the ethical question whether the demands of society toward MNEs are actually *justified*. Also, there is little agreement on what *exactly* lead firms are responsible to do: Are they responsible for working conditions at the contracted suppliers or does their responsibility extend to subcontracted producers and suppliers’ suppliers? Are buying companies responsible for implementing national laws (e.g. ‘minimum wages’) or for ensuring working conditions and wages above legal standards (cf. Starmanns 2011, 199)?

It is the question about the *moral bases* of the claim that MNEs are responsible for exploitation in their supply chains, the question *what* they are actually required to ensure in terms of working conditions, and particularly the question whether MNEs have a responsibility for ensuring *living-wages* in their supply chains that I am going to explore in the following. In this sense, I will treat the above mentioned public opinion as a *moral intuition* holding that multinational companies are indeed accountable for exploitation in their supply chains, and ask: how (if at all) can this public intuition be philosophically justified?

7.4.2.2 The moral grounds of MNEs' presumed responsibility for exploitation in their supply chains

To get an idea of the claims and assumptions that are often made regarding the moral grounds for MNEs’ responsibility for wrongs in their supply chains, consider the following exemplary quotation:

A firm “cannot hire child labor, nor can it *promote* the practice of hiring children by the contractors or suppliers with which it deals. For if the practice is unethical, then to *help promote* and *indirectly support* the practice is at least indirectly to act unethically. (...) ethics demand that if one considers an action wrong, then one cannot consistently claim that *encouraging* others to perform the action *for one’s benefit* is ethically acceptable” (De George (1996), 88-89, emphasis added).

Of course actively promoting and encouraging a wrongful practice is supposedly blameworthy.

But the claim is stated in a more careful way in the same quotation: to “help promoting” and “indirectly support” a wrongful practice “for one’s benefit” is “at least indirectly to act unethically”. To amount to an *argument* for companies being responsible for wrongs in their supply chains, this claim is certainly in need of quite a number of additional premises. These premises concern assumptions about the *conditions for the ascription of responsibility*. In the quotation above, as in many other claims on the matter, these conditions are not made explicit. Also, it is necessary to clarify what exactly is *meant* by the claim that companies are “responsible” for (bad) working conditions in their supply chains. Is it that they *cause* them? That they are to be *blamed* for them? That they have to *redress* them?

There is no straightforward answer to this question since, as we saw in chapter 3.4, “responsibility” is a very multifaceted notion. To be able to judge the plausibility of (P2), in the following I will apply the findings on responsibility from chapter 3.4.1 and Miller’s connection theory of responsibility (chapter 3.4.2) to the context at hand. To be able to do so, we first need to get a better understanding of how MNEs interact with their supply chains.

7.4.2.2.1 *The interaction of MNEs with their supply chains*

Let us have a look at those elements of how the MNE interacts with the actors in its supply chains which are crucial for our question. We will do so with the example of a fashion brand. The MNE places an order, either with a buying agent A or directly with a garment producer B. Brands specify the quality of the ingredients used by B, but they do not have direct contracts with textile producers C or fiber producers D (usually only B has contact with C, and only C with D). When placing an order, a purchasing contract determines at least four criteria (Humphrey/Schmitz 2001): (P1) Product: what shall be produced? (P2) Quantity: how many pieces shall be produced? (P3) Delivery: when and how shall the products be delivered? (P4) Standards: what social and environmental standards must be complied with? (cf. Starmanns 2011, 197). Additionally (P5) Price: what price will be paid under consideration of P1-P4?

Generally, the lead firm and the supplier *agree* on a price in a negotiation. Who holds more power in this negotiation depends on several factors. Starmanns claims that “a large brand is usually in a better bargaining position than the supplier, because the brand can always choose to place the order with another company (ibid.). Even if changing the supplier results in additional costs, most brands regularly select new suppliers, which has been interpreted as part of a lead firm’s ‘power’ in so-called ‘buyer-driven’ chains (Gereffi 1994). However, in some supply chains the supplier rather holds the power, because he is much larger than the lead firm” (Starmanns 2011, 197f).

The latter issue is part of the *governance* of value chains. To analyze the government of global value chains, Gereffi et al. (1994, 2005) developed a Global Value Chain (GVC) framework,

distinguishing between different types of governance. Some scholars have argue that the GVC framework is not well suited for analyzing problems related to global production since the concept of “chains” does not represent the complexity of the actual production processes (Dicken et al. 2001; Coe et al. 2008; Hughes et al. 2008; cf. Starmanns 2011). Dicken et al. (2001) suggested that the concept of “networks” is more suitable, and accordingly developed a global production network (GPN) framework which also includes relationships among producers and various other actors who influence production: brands, governments, industry lobby groups, NGOs, consumers, and others.

With this very general picture of the main kinds of interactions between MNEs and their supply chains in mind, we will now apply Miller’s connection theory of responsibility to the question of MNEs responsibility for wrongs in their supply chains. Our aim in doing so is to establish reasons for making a judgement concerning the remedial responsibility of MNEs for putting them right. In this context we will identify the most relevant aspects in terms of the supply chain structure and governance regarding the question at hand. In the course of the analysis, we will engage more deeply with those aspects of supply chain governance that are relevant for our question.

7.4.2.2.2 *MNE’s responsibility for wrongs in their supply chains*

In our analysis we will first try to establish if MNEs are to be considered *outcome responsible* for the wrongs in question. If they are, the additional question is whether they should be seen as acting morally blameworthy in this respect, since an affirmative answer would justify judging MNEs *morally responsible* for them. The latter is according to Miller the most powerful moral reason to assign remedial responsibility, since “by holding A remedially responsible for P we not only create a mechanism for getting P out of that condition but we also help to put right the moral imbalance between A and P” (Miller 2007,100).

a) Outcome responsibility

For a justification of the accountability of MNEs for exploitation in their suppliers we have to focus on their so-called *outcome responsibility* for the exploitative transactions.¹⁰⁶ For the identification of outcome responsibility we want to know whether a particular agent can be credited or debited with a particular outcome O – in our case the exploitation in the context of suppliers’ operations (Miller 2007, 87). Outcome responsibility is so important for the assignment of accountability because we want people to be able to control what benefits and burdens they receive, but we also want to protect them against the side effects, intended or unintended, of other people’s actions (Miller 2007, 89). Accordingly, in case an agent is identified as being outcome responsible for a crime, this gives us reason to require him to make compensation or redress to that person. This is clearest if he

¹⁰⁶ In what follows I follow Millers (2007) account of the conditions of outcome responsibility.

acted morally blameworthy, but can be so even in the absence of moral responsibility – that is if he acted morally innocently or even praiseworthy.

What then are the conditions for someone being outcome responsible for a bad state of affairs? According to Miller, the criteria of outcome responsibility are the following: 1. causal contribution, 2. control over one's actions, 3. a reasonably foreseeable connection between the action and the outcome, and 4. other options for action.

The first condition is that the agent must in some way have causally contributed to the outcome. In this way, outcome responsibility is connected to causal responsibility and its key question: why did O occur? It is important to note that “causal contribution” is a much weaker condition than causal responsibility would be. Identifying the latter is very tricky since there are always several factors contributing to an outcome and it is hardly ever possible to single out a particular one as its only cause (Cassese 2008; cf. Hart/Honoré, 1985, ch. 2;). This distinction is relevant because the causalities with regard to wrongs in supply chains are hazy for structural reasons. In this sense it can be argued that the most important cause of bad working conditions are not MNEs nor suppliers, but 'the market' itself. If the market demands something, e.g. through a short term increase in demand, this causes economic actors to require their suppliers to work overtime to meet the demand.

But even in the case of such market-related problematic working conditions, we must remember that there is hardly ever one single cause for any event. So even if we take 'the market' to be the main cause of market-related poor working conditions, all that is required for the causal-contribution-condition to hold according to Miller's concept of outcome responsibility is a causal or enabling contribution of some sort for the working conditions in question, which combined with the other conditions will suffice for establishing outcome responsibility.

Let us examine if there is such a causal contribution of MNEs for exploitation in their supply chains. What is usually implied in criticisms of MNEs' actions is that MNEs causally contribute to exploitation in their suppliers through their *power* over the supplier, through which the MNE is in a position to basically dictate actions and working conditions to the supplier. To see how *much* power MNEs are often assumed to have, consider the following paradigmatic statement: “The fear that the flighty multinationals will once again pull their orders and migrate to more favorable conditions underlies everything that takes place in the [freetrade] zones. It makes for an odd dissonance: despite the fact that they have no local physical holdings – they don't own the buildings, land or equipment – brands like Nike, the Gap and IBM are omnipresent, invisibly pulling all the strings. They are so powerful as buyers that the hands-on involvement owning the factories would entail has come to look, from their perspective, like needless micromanagement. And because the actual owners and factory managers are completely dependent on their large contracts to make the machines run, workers are left in a uniquely weak bargaining position: you can't sit down and bargain with an order

form” (Klein 2010, 226). And further: “If anything, the multinationals have more power over production by not owning the factories. Like most committed shoppers, they see no need to concern themselves with how their bargains were produced – they simply pounce on them, keeping the suppliers on their toes by taking bids from slews of other contractors” (ibid.).

In cases where the multinational company is the only or main client of a supplier, it is plausible to assume that it has the amount of power over the supplier that Klein’s statements assume.¹⁰⁷ In many cases though, sub-contractors fill orders for a variety of MNEs. Besides, in some supply chains, export companies (such as the huge Li & Fung in the garment sector) play an important role linking MNEs and producers in developing countries by taking the formers’ orders and coordinating their implementation by the latter (Starmanns 2010, 10). In such cases, MNEs can hardly be seen as having substantial causal influence on the actions of the supplier, so Klein’s statement must be qualified.

However, even in the latter case there are two lines of argument for the claim that MNEs make *some* causal contribution to exploitation in suppliers. The first one concerns the MNE’s purchasing policy: Through their purchasing policy with its conditions and requirements for the suppliers a company gives strong incentives for one or another course of action. If their only requirement is that goods must be produced as cheaply as possible (and we are talking little margins since suppliers are in a race to the bottom with other suppliers all over the world), this leads to the suppliers getting very low prices for their goods, which forces them to reduce all possible costs – at all costs. This will certainly be conducive to bad working conditions. If on the other hand MNEs *require* good working conditions, then suppliers will try to modify them accordingly, since they depend on being able to sell to their buyers. The claim that companies can be simply „neutral“ with respect to conditions in their supply chains is therefore implausible: at least through their purchasing policy MNEs can be seen as causally contributing to bad or good conditions in their supply chains.

Second, certain specific requirements might be seen to causally contribute to exploitative practices. For example, if the multinational company requires high volume short term extra production, the supplier will have to let his employees work overtime to fulfil the requirement.

Third, it amounts to a causal contribution to exploitation to buy from an exploitative supplier since it contributes to the businesses being profitable, and thereby to their being able to continue their exploitative practices. The bigger the orders, the bigger the contribution. Note however that in this case we need to distinguish between cases of harmful exploitation and beneficial exploitation. In the former case, the contribution is certainly to an unacceptable moral *wrong*. In the latter case, as we saw earlier, this is not as straightforward: contributing to the business being profitable could also be interpreted as contributing to the employees of the supplier having jobs at all instead of no jobs. How we judge this depends on our assessment of the MNEs possibility to

¹⁰⁷ Such chains in which buyers have a lot of power over suppliers are called *buyer-driven* (Gereffi/Humphry et al. 2001).

enforce *fair* wages in their suppliers, which in turn depends on their power over the supplier (see above).

Let me turn to Miller's second condition for outcome responsibility, which is that the agent has control (in the relevant sense) over his actions, which implies genuine agency. This condition excludes among others cases of mental derangement, manipulation, and coercion. With regard to our question, mental derangement as an excusing factor is out of the question since we deal with a corporation, not a person. Manipulation is not something that we see as a ground for the normal dealings of a company either, and neither is coercion. The question in how far the actions of companies should be seen as 'coerced' by the inherent necessities of the market was discussed in the last section already. I argued there that companies in most cases should not be seen as genuinely "coerced" into actions leading to poor working conditions by the market, and if this is correct, the control-over-one's-actions condition is fulfilled.

The third condition is that there is a reasonably foreseeable connection between the action and the outcome – or more precisely, that a reasonable person would have foreseen the negative consequences of the action, given the circumstances (ibid., 96).¹⁰⁸ This doesn't require that the outcome is produced intentionally – one can be outcome responsible for bad outcomes of negligent actions as well: when I pick up a fragile figurine "I can be expected to foresee that unless I handle it with care, there is a danger that it will break. Handling it roughly is an action of mine that with some probability will produce the result that does occur, so when the figurine smashes the responsibility and the costs fall to me" (ibid., 88).

When applying this condition to our question we have to ask if MNEs could reasonably foresee, or know about, the negative effect some of their causal contributions have for the conditions in their supply chains. Considering the high levels of monitoring in suppliers with close connections to the MNEs, the latter must be assumed to know in many cases about the exploitation in their suppliers, and they can be expected to make the connection to certain requirements and actions of theirs. Even in cases where there are no close ties between supplier and MNE, in many cases it is nowadays well known that the mainstream commodity production implies weighty moral wrongs, such as for example in the case of cocoa production in the Ivory Coast where child slavery is known to be extremely widespread (see e.g. Manzo 2005). Of course MNEs know that buying such commodities contributes to the profitability of criminal businesses and thereby supports the continuation of the wrongs. It seems plausible then to claim that MNEs should be considered at the very least negligent with regard to the risk of contributing to bad working conditions and exploitation in their supply chains, which suffices for the condition of reasonable foresight to be fulfilled.

The fourth condition for the ascription of outcome responsibility is that the agent must have had other options open to him and could have acted in a way to avoid the bad outcome (Miller

¹⁰⁸ Here Miller follows Ripstein 1999, ch. 4.

2007, 95). I take this again to be the point that was discussed before. I argued that although the problem of the comparative disadvantage of businesses with higher social (and ecological) standards is to be taken serious and solutions have to be found, it isn't a convincing argument for the claim that the condition of 'having other options' is not fulfilled. This would only be so if company action were inescapably determined by the market – which is obviously wrong. To the contrary, highly profitable multinational companies do have a certain action range open to them, even under the presumption that they have to try to stay in the market. There are, among other options, always several possible ways to internally cut costs, an obvious example being to reduce executive perks. In the case of market supply chain links, the claim that as isolated actors MNEs don't have the option not to contribute to wrongs in the production is equally misleading: they have the possibility to either buy commodities from socially certified production (e.g. Fair Trade-labelled) and/or to seriously engage in collective action with other buyers, governments, NGO's etc. to solve the problem. This suggests that the condition of other options is fulfilled in the relevant sense.

Summing up this short analysis of the conditions of outcome responsibility with regard to MNEs and exploitation in their suppliers firms, we have reason to conclude that the outcome responsibility of MNEs is strongest in the case of MNEs in a strong power position in relation to their supplier. This seems to be the setting most people claiming that multinational companies are (outcome) responsible for exploitation in their supply chains have in mind (cf. e.g. Nichols/Opal 2005). In the case of MNEs in weak power positions in relation to their supplier, the outcome responsibility of supplier firms themselves weighs much heavier than is often assumed, and should clearly be in the focus of remedial justice. However, even in these cases MNEs seem to carry a certain outcome responsibility for the exploitative working conditions.

That MNEs are generally to be seen as outcome (co-)responsible for bad conditions in their supply chains is a weighty reason for assigning them some remedial responsibility for them. In a next step we will consider if they should also be judged *morally* responsible for them. If so, they would fulfil the probably strongest condition for the ascription of remedial responsibility.

b) Moral responsibility

For an agent to be *morally responsible* for something, the first condition is that he “must have acted in a way that displays moral fault: he must have deprived P deliberately or recklessly, or he must have failed to provide for P despite having a pre-existing obligation to do so.” (Miller 2007, 100). This excludes cases where someone acts morally innocently or praiseworthy but produces a bad outcome nevertheless – an example would be the case where an agent is rushing someone else to the hospital and damages another's car in the course (ibid., 90).

With regard to bad conditions in the supply chains of MNE's we accordingly have to ask if MNE's fulfil the condition of having acted in ways that display moral fault. An important reason for claiming that this is indeed so is given when they must be assumed to know about the wrongs in

their supply chains and still go on contributing to them. This certainly applies where the production of some commodities is well known to imply weighty moral wrongs.

Turning a blind eye on bad working conditions in their suppliers while contributing to them should, or so I would argue, be seen as a conscious decision to let them go on, which is certainly not to be considered “morally innocent” but rather blameworthy. In combination with additional connections (which are considered below), this probably puts a substantive degree of moral responsibility on the multinational company.

Could we argue that MNE’s are morally required to *make sure they know* that there are no bad working conditions in their suppliers (as opposed to the cases where they happen to know about bad conditions)? This would amount to claiming that MNE’s have prospective responsibilities with regard to the working conditions of the people in their supply chains. I think this is plausible, but the argument for this claim must be put off until we have looked at the remaining conditions for remedial responsibility.

c) Profiting from wrong or injustice

The claim that people and companies have a duty not to profit from previous *wrong* or *injustice* is often brought forward when MNEs are blamed for exploitation and wrongs in their supply chains. In this context, Pogge for example argues that we all have “a negative duty not to ... *profit* from the unjust impoverishment of others” (Pogge 2002, 197, my emphasis). In their paper Anwander/Bleisch (2007) argue that profiting from injustice or wrong *per se*, that is, independently of causal contributions, is morally relevant (ibid.). It seems that the intuition that profiting from injustice or wrong is blameworthy is widely shared (see e.g. Anwander/Bleisch 2007, 182).

So, what are the moral bases for the claim that profiting from a wrong conducted by somebody else makes the profiting party blameworthy and/or puts some kind of responsibility on him?

This question is much more difficult to answer than we usually assume. Our psychological unease and moral intuition with regard to profiting from wrong seems to suggest that there is something like a “contagion with the wrong” to the profiting party (e.g. Green 2002, Anwander/Bleisch 2007, 183). Although I believe this is a good formulation of our common intuition regarding the matter, it is unclear what this is supposed to mean in concrete ethical terms. How then could this claim be formulated more concretely, and how could it be justified?

A second perspective on profiting from wrong is that it generates a responsibility to remedy the wrongs in question. The idea that those who profit from injustices should also participate in measures to overcome these injustices seems to be widely accepted. In this sense, the following statement from Gosepath seems to be intuitively appealing: “Responsible for remedying of a wrong (...) are (...) primarily those who cause, support, or *profit* from them” (Gosepath 2006, 398, cited in: Anwander/Bleisch 2007, 184f). As we saw in chapter 3.4.2, Miller equally counts benefiting from wrong as a condition that can generate remedial responsibility for the wrong in question. The idea is obviously that profiting from wrong is in some way a morally relevant form of *involvement* in the injustice. But how can this claim be justified?

The most promising line of argument seems to be that profiting from wrong leads to *unjust enrichment*, which leads to the duty to restitute the unrightful gains. According to David Miller (2010) for example, in cases of benefiting from wrong the agent „has been *unjustly enriched* by the train of events that led to P's being deprived...” (ibid.,103, italics added), and this requires the profiting party to rectify the situation.

The central idea of the concept of unjust enrichment, which is relevant in both the Anglo-Saxon and continental judicial order, is that someone who has profited to the detriment of someone else is obliged to hand over the profits if the latter is based on an injustice or wrong or if there is no legal basis for that profit – even if the one who profited did not commit any injustice himself (Anwander/Bleisch 2007, 186, FN 31; cf. Brooks 1989, 36; Birks 2001 and 2005). To exemplify this, consider the case where A makes a gift of a bicycle to B which he has stolen from C. In this case, since B's gain is based on an injustice it constitutes an unjust enrichment. Even if B has not committed an injustice herself she has an obligation to return the bicycle to C, its righteous owner. The example shows what is required in cases of unjust enrichment: the good has to be returned to the one who suffered the injustice (Anwander/Bleisch 2007, 187). It is important to note that the duty to remedy the injustice is not based on the blameworthiness of B, nor is it to be understood in the sense of a punishment to B. Rather, B merely has a duty to contribute to remedying the wrong that was done to C so that C is not worse off than she would have been without the injustice (ibid., 187).

If however B made an extra profit from the bicycle (e.g. by renting it to others) C would not have a claim to this profit since it had nothing to do directly with the injustice that happened to C (ibid., 188).

When trying to apply this perspective to the case of MNEs profiting from wrongs or injustice in their supply chains, there are at least two things that might make the analogy problematic: First, in our case there are no tangible goods that could be restituted – what is at issue rather economic advantages. Second, it is questionable if the profits actually happen directly to the detriment of the workers in the supply chains of the MNEs (ibid.,189).

Regarding the former problem, it seems not a problem per se that restitution in our context would not be in tangible goods but in monetary (or other) terms. Of course the exact amount required for restitution might be hard to determine, but that is not a fundamental argument against that claim. And even the second problem doesn't seem fundamental since what is at issue is simply the following: as long as the ones primarily responsible for the injustices don't remedy them, the profits that were made on the basis of these injustices should be used to do so. This serves a just distribution of the costs for remedying the wrongs, since the profiteers are not required to make special sacrifices but merely to forego the profits which they have no claim to (ibid., 190).¹⁰⁹ The main point in this argumentation is that people (and companies, organizations, etc.) don't have a *claim* to profits that are based on injustices or wrongs, even if they are not outcome responsible for the wrongs. Anwander/Bleisch call the relevant duties of justice *restitutive* duties (ibid., 192). These duties fall neither in the category of negative nor positive duties but in an extra category. Again, they require that unjust profits one has no claim to are given back to the victims of the injustice or used for remedying the injustice in question.

According to this line of argument, insofar as the profits of MNEs can be said to be at least partially based on wrongs in their supply chains and thus to constitute unjust enrichment they have such restitutive duties towards the victims of these wrongs in their supply chains.

But this argumentation is problematic or at least incomplete. Consider the following example: A and B both apply for the same job, and then A gets beaten up by a thug (an event which B had nothing to do with) and stays injured. As a consequence, B gets the job. Would we be justified for putting moral blame on B since he "has been unjustly enriched by the train of events that led to P's being deprived"? And would we think that he has a moral duty to remedy the wrong in question? This certainly seems counterintuitive, and upon consideration unjustified, since B didn't contribute in any way to the wrong, couldn't have prevented it and actually didn't do anything wrong at all. He simply happened to be the beneficiary of the unfortunate event that befell P. The only thing we could reasonably blame B for would be if he *felt happy* about A's misfortune that contributed to his own good fortune. From the perspective of virtue ethics, we would consider these feelings a sign of bad moral character. However, above this they would certainly not be considered a reason for putting remedial responsibility on B.

Let's look at the particular case of moral wrongs in the supply chains of MNEs, and how they are related to the example above. In what sense could MNEs be said to be profiting from wrongs in their supply chain? Generally, if the wrongs reduce the production costs of the supplier and lead to him being able to offer a cheaper price to the MNE, the latter makes a higher profit than it would without the wrongs occurring, and can in this sense be said to profit from the

¹⁰⁹ This argument could also be applied to the question of the duties consumers have towards workers in the global supply chains of the products they buy: they could accordingly be said to have a duty of justice (as opposed to fairness) to use their gains from wrongs done to these workers to remedy the injustices done to them.

wrongs done to the workers in their supply chains. However, as we said, mere profiting from the wrongs is not enough to make them morally blameworthy. But in our case, there is more, because the wrongs in the supply chains and the MNEs' profit are potentially negatively related: the *worse* the conditions in the supply chains and the cheaper the price the suppliers can accordingly offer, the *higher* the company's end margin and profit. Seeing that companies (or rather their shareholders) are commonly interested in making as much profit as possible this negative relation is interpreted as implying that they (or the shareholders) must accordingly be *happy* about the wrongs since they lead to a bigger profit for themselves – and that, as a consequence, they have an interest in keeping the wrongs happening. It is this interpretation that turns the companies into *profiteers* from wrongs – a notion with a strong negative connotation that implies the *deliberate* choice for (or acceptance of) the wrongs in the supply chains for the sake of maximum profit. If that picture were correct, this would of course be highly blameworthy in terms of virtue ethics. The assumption is of course hard to proof.

From what has been said, I take it that the fact that someone indirectly benefits or profits from a wrong per se is *not* a sufficient reason to put moral blame on them, nor is it necessarily a reason for assigning a duty to remedy the wrongs in question. However, in situations where the benefitting from wrong is structurally connected to outcome responsibility and moral responsibility, I take it that it is plausible to count it as an additional reason for morally blaming and for assigning remedial responsibility to an actor. This applies to MNEs as well.

d) Capacity to remedy

The fourth kind of connection that grounds remedial responsibility according to Miller is *capacity to remedy*. This concerns the capability of actors to remedy the bad situation in question. Relevant in this respect are both the effectiveness of the help and the cost for different potential agents: the agent who could help most effectively and at minimal cost has the highest capacity to remedy.

I take it that in cases where moral or outcome responsibility can be identified, remedial responsibility will fall on the respective agents first. But if they don't have the capacity or means for bringing relieve, there is not much sense in assigning them the responsibility to do so. Accordingly, in the mentioned case responsibility is considered to shift to other agents who can bring relieve effectively and at little cost. If there are several potential agents, responsibility might be divided between them (Miller 2010, 104f).

For our question if MNEs have remedial responsibilities concerning wrongs in their global supply chains, the capacity condition probably means the following: the higher the control and influence over the suppliers, the higher the MNE's capacity to remedy the wrongs in their supply chains. Here again much depends on the size of the MNEs orders to a particular supplier as compared to his overall capacity. A company only filling 1% of a factory's capacity will have severe difficulties to

improve the workers' situation, whereas a company that fills 90% of a factory's capacity will have a large influence on the supplier (Starmanns 2011, 207). In cases in between these two extremes, suppliers might have other possibilities to improve the situation of the workers, e.g. through searching a dialogue with the suppliers, or through striving for industry wide regulations. The claim that they cannot influence the suppliers and therefore cannot be assigned any remedial responsibility could only be taken seriously after such possibilities have been intensely pursued and proved to fail.

7.4.2.3 Conclusions on (P2)

We can now sum up what has been said so far on the fulfilment of the conditions of remedial responsibility for the case of bad working conditions in the supply chains of MNE's. As we have seen, the analysis gives us weighty reasons in many cases for judging the MNE's remedially co-responsible for them: they are often co-outcome responsible for bad working conditions and low wages; they are in many cases morally responsible for them since they knowingly go on contributing to them; and they have the capacity to change things for the better in many cases. Granted this is right, what form should that remedial responsibility take?

In certain cases it could mean that the MNE's, possibly together with the co-responsible supplier businesses, have to compensate the people who suffered the wrongs. But as I see it, remedial responsibility in our context primarily has implications for the *prospective* responsibility of MNE's. The connection between remedial responsibility and prospective responsibility with regard to bad conditions in the supply chains of MNE's is the following: when structural matters put an agent (in our case, an MNE) in a position where he is to be judged constantly remedially (co-)responsible for a certain on-going bad state of affairs, his remedial responsibility gets a prospective dimension, namely the preventive obligation to changing this situation such that the respective state of affair is sustainably put right.

This argument interestingly takes a different route than we originally expected: We said at the outset that if we could show that MNEs are *prospectively* responsible for wrongs in their supply chains we could consider them *outcome* responsible in case such wrongs happen. Now however we argued that in cases where MNEs are judged to be structurally *remedially* responsible for such wrongs they acquire a *prospective* responsibility for preventing them.

Assuming that our argument is plausible, what form should this prospective responsibility of MNEs for avoiding exploitation in their supply chains take? There are mainly three practices are relevant in this respect:

- A) *Legislative governance (Starmanns 2010, 15): Codes of Conducts (CoC)*: Most brands define certain working standards in their CoCs, which are quite standardized nowadays regarding their minimal requirements: most require national law and the core ILO norms to be adhered to. Above that some brands require that living wages be paid. In the CoC lead firms

also specify which stages of production processes must comply with the required standards (i.e. only direct suppliers, or also subcontractors and producers further away from the lead firm) (Starmanns 2011, 199).

- B) *Judicative governance* (Starmanns 2010, 15): *Audits*: most lead firms control if their suppliers comply with the CoC. However, while being expensive, audits as such do not lead to improvements for the workers. The important question is what happens when standards are found to be unfulfilled in the audit, which leads us to C).
- C) *Executive governance* (Starmanns 2010, 15): *Support for improving working conditions*: Some brands support their suppliers in improving their working conditions. However, “these practices differ very much and so does the time and efforts to implement standards. For example, few companies try to adapt their purchasing policies to the extent that prices do not conflict with the demands of implementing working standards” (Starmanns 2011, 200).

In terms of tools for the implementation of social standards, probably the most popular strategy is currently voluntary *Multistakeholder-Initiatives* or Governance-Networks that approach the problems by involving stakeholders within specific industries to define, audit and improve social standards (like e.g. in the garment industry the *Fair Wear Foundation (FWF)*, *Ethical Trade Initiative (ETI)*, *Business for Social Compliance Initiative (BSCI)* etc.¹¹⁰) (Utting 2002, Starmanns 2010).

7.4.3 (P3) *Being Responsible for Exploitative Transactions is a Sufficient Condition for MNEs Engaging in Unfair Trade*

Finally, how should we judge the premise that responsibility for exploitative transactions in one's supply chains is a sufficient condition for being engaging in unfair trade?

Let us start with a general moral understanding of “unfair” as “unethical”. We defined ethical trade as being trade in the context of which no moral rights are violated. We argued that harmful-nonconsensual exploitation implies right violations, so harmful- nonconsensual exploitative transactions in the supply chains of MNEs are an instance of unethical trade. If MNEs are co-responsible for harmful-nonconsensual exploitative transactions in their supply chains, they should accordingly be seen as engaging in unethical trade. If we consider beneficial-consensual to be a rights violation too, the same applies if MNEs are co-responsible for beneficial-consensual exploitative transactions in their supply chains. However, we saw that this is more controversial than we might have thought.

What about the version of the premise that claims that responsibility for exploitative transactions in an MNE's supply chains is a sufficient condition for them being guilty of unfair trade in

¹¹⁰ There are over 40 such initiatives by now (Fransen / Kolk 2007).

the specific moral sense? Can we construe a plausible version of the argument while understanding *unfair* in the sense of the specific moral fairness concept?

Since exploitation (even the beneficial-consensual form) implies unfair advantage taking and is accordingly unfair, exploitative transactions in the supply chains of MNEs are a clear instance of unfair trade. But does it make sense to claim that MNEs are themselves engaging in unfair trade if they are co-responsible for exploitative transactions in their supply chains? Unfairness as we understood it is about disadvantaging others in interactions under certain conditions. As far as I can see MNEs don't disadvantage the actors in their supply chains that they don't deal with directly, and I don't see how this claim could be plausibly upheld. In this sense I consider premise (P3) only plausible in the form of the claim that MNEs are engaged in *unethical* trade.

7.5. Conclusions on Fair Trade on the Level of the Supply Chains of MNEs

In this chapter I considered three widespread positions on fair trade on the level of the supply chains of Multinational Companies: *position (h) fair trade on the level of MNEs is trade which duly takes into account or equalizes the interests of the workers their supply chains*, *position (i) fair trade on the level of MNEs is trade that proportionally distributes the burdens and gains of trade throughout their supply chains*, and finally the position *(j) fair trade on the level of MNEs is trade that is not involved in exploitation through their supply chains*.

Regarding position h) we argued that it can be understood as respecting the interests of stakeholders in the *process* of the transactions via an inclusive kind of a process, or directly in the *outcome* of the transaction via an independent criterion of outcome justice. If the former is at stake, this presumably plays out as demanding some sort of *deliberative* process with regard to determining the working conditions, or a demanding understanding of the voluntariness requirement. If we focus on the latter, we will need a criterion for deciding what a just distribution of costs and gains amounts to in this context. This led us to position n) which proposes just that.

Regarding position i) we argued that this position is indeed a position on *fair trade* proper, that is, it is based on the specific moral fairness concept, in this case in the form of the standard of the proportional distribution of burdens and benefits. We argued that it would in principle be possible to construct a rough formula for such a distribution and suggested how this could look. However, we argued that supply chains don't possess the relevant traits to be considered as cooperative structures in the relevant sense as to trigger the fairness standard of a proportional distribution of burdens and benefits; and that above that, assuming position i) is not advisable because it would undermine important functions of the free market. Accordingly we concluded that position i) is not plausible.

Finally, regarding position j) we argued that when focusing on the actions of MNEs, it is

plausible as a position on ethical trade, but not as a claim on fair trade proper. We argued that harmful-non-consensual exploitative economic transactions are clearly morally unacceptable, and that, while the argument is much more complicated in the case of beneficial-consensual exploitation, from the perspective of companies offering them they are ethically unacceptable as well. I reasoned that beneficial-consensual exploitative transactions are unfair with regard to a combination of the procedural and the outcome dimension, and offered an argument on these grounds for the claim that living wages are a demand of fair trade in direct economic transactions. Based on the application of Miller's connection theory of responsibility I concluded that MNEs have the prospective duty to ensure that there are no moral wrongs in their supply chains, including exploitation, which requires minimally that living wages are paid.

8. Final Conclusions

This thesis started from the observation that global trade is attacked from various sides and in many different ways as being unfair. On this background, my first aim was to get a deeper understanding of what these criticisms considered unfair, what their respective understanding of fair trade was and what normative grounds the positions were based on. My second aim was to develop the basics of a position of my own with regard to the question what fair trade amounts to, particularly in the supply chains of MNEs, and to examine if and how it is justifiable that living wages are a demand of fair trade in the supply chains of MNEs. Let me summarize the findings of this thesis regarding these objectives, starting with the former, the goal to get a deeper understanding of what the criticisms of global trade considered unfair, what their respective understanding of fair trade was and what normative grounds the positions were based on

I started out with a broad understanding of the term "fair trade" to capture the relevant issues in debates on the topic of fair trade, and later on distinguished between positions with regard to their ethical foundations. Correspondingly, I classified them into positions on *ethical trade*, *just trade*, and *fair trade* in the following way: 1) *Ethical trade* refers to the actions of trading actors. Its basic condition is that trading actors fulfill their perfect moral duties with regard to trade, meaning that they don't violate negative rights in the context of trade, and are not co-responsible for other actors violating negative rights either. The extent of trading actors' duties is defined by the scope of their corresponding responsibility.

2) *Just trade* refers to trading systems. Its conditions are that the background conditions and the distributive outcomes of the trading system are just with regard to the fulfillment of people's stringent moral rights and claims. In this sense, just trade is embedded in the context of whole institutional systems and linked to a conception of distributive social justice. With regard to global trade, positions on just trade are accordingly related to positions on global justice. Assuming the international context is a context of justice in a minimal sense that respects people's basic moral

equality, I take it that for the global background conditions of trade to be considered just, it is at least required that people's basic rights are fulfilled in a sufficientarian sense.

Additionally, I argued that according to my examination of the relation between the three dimensions of justice, if background conditions of trade are just, *pure procedural justice/fairness* in trading interactions is enough for them to qualify as morally legitimate. But if just background conditions are absent, procedural conditions must be conceived in a more demanding way to ensure people's basic moral equality is respected, which is what I spelled out in the course of the thesis as being about a substantial understanding of voluntariness. Or, I had said, outcomes of trade must be judged in their own right in terms of how they satisfy the parties' substantive claims.

3) *Fair trade*: The basic condition of *fair trade* with regard to the trading system is that the rules or terms of trade (background fairness) are fair. In my understanding, for them to be *fair* means that no party is disadvantaged with regard to the rationale of the practice, against a presumption of basic equality of the parties, and an ideal of equality of opportunity among them.

With regard to trade among trading actors, I argued that the main condition of *fair trade* is a procedural standard, namely that no party is disadvantaged in transactions, with regard to the rationale of the practice, against a presumption of basic equality of the parties, and an ideal of equality of opportunity among them. This takes background conditions into account in the sense of (hypothetically) correcting them so as to enable the equal participation of the disadvantaged parties in trade exchanges. Accordingly, as long as background conditions disadvantage some parties in a process, fairness requires us to adjust the process in a way that makes up for the disadvantage, or to hypothetically "imagine the disadvantage away" when deciding on the outcome. Since just background conditions are not given in the current non-ideal situation, to ensure people's basic moral equality is respected, the conditions of *fair global trade* are more demanding than they would otherwise be. With regard to procedural conditions, fairness in trade requires that no advantage is taken from other's being disadvantaged by the background conditions of the interaction, which implies correcting for the disadvantage in the trade exchanges itself. Interestingly, although I focused on the procedural dimension, my argument regarding the unfairness of exploitation led me nevertheless to an outcome related standard for these cases as well, namely that the outcome of transactions has to be acceptable in absolute terms.

In the special case of cooperation, I argued that the additional outcome related fairness standard of *sharing burdens and benefits proportionally* applies and has to be fulfilled for the outcomes of the cooperation to qualify as fair, which I called "outcome fairness".

Let me summarize the main results of my analysis of the 10 positions on fair trade that I examined, categorizing positions with regard to their ethical foundations.

1) *Ethical trade*: The first position on ethical trade is position 1) fair trade is trade that respects the claims of future generations, which is advanced by Boda. I said that I take this position to be highly plausible and consider the resulting duties to apply to both the actors shaping the global trading system as a whole, and for individual trading actors.

On the level of the trading practices of the supply chains of MNEs, position (h) *fair trade on the level of MNEs is trade that duly considers the interests of the workers in their supply chains* is also a position on *ethical trade*. This position is based on stakeholder theory and comes with its merits and problems. It is not per se informative in cases where stakeholder interests clash, such as remuneration.

2) *Just trade*: Position (b) *fair trade is free trade* is a position on just trade. A first line of argument which I consider plausible holds that free trade is just based on the non-instrumental value of liberty, in the sense that it prohibits coercion. The line of argument based on desert fails. A third, highly important line of argument holds that free trade is just on utilitarian grounds since it maximizes welfare, mediated through efficiency. It holds that free trade is desirable insofar as it leads to growth, and insofar as growth is necessary for welfare gains and development. I consider this argument strong, but only insofar as actual markets come close to the ideal market of the theory, which is very rarely the case. I argued that the measures of the Fairtrade movement that aim at correcting market failures are sensible and desirable.

Position (c) *fair trade is trade that serves the worst off* is another position on *just trade*. I argued that its plausibility depends entirely on a cosmopolitan position on global justice, which can be as minimal though as a sufficientarian one developed by Sen. The latter seems plausible to me, although I didn't argue for it in this thesis.

On the level of trading policy of states, position (g) *fair trade policy balances the legitimate claims of citizens and foreigners proportionally which is* taken by Risse/Kurjanska is also a position on *just trade* in my terminology. It serves to judge the claims of domestic producers to protectionist measures against the claims of foreign producers. As I argued, it does not, yield a general convincing argument in favor of protectionist measures, stating that although certain domestic losers of trade might have a claim to protection, this should be effectuated in ways that do not jeopardize efficiency and the according welfare gains, that is, e.g. by social security schemes.

With regard to individual trading transactions, according to our examination of the relation between the three dimensions of justice, if background conditions of trade were just, *pure procedural fairness* in trading interactions would be enough for them to qualify as morally legitimate. But if just background conditions are absent, procedural conditions must be conceived in a more demanding way to ensure people's basic moral equality is respected. Assuming the international context is a context of justice in a minimal sense that respects people's basic moral equality, I take it that for the background conditions of global trade to be considered just it is at least required that people's basic rights are fulfilled in a sufficientarian sense.

3) *Fair trade*: Position (a) *fair trade is trade the rules of which are determined in a fair way*, is a position based on fairness proper. Strictly speaking, it is not about *fair trade* but about *fair negotiation*. But the fairness or unfairness of the negotiation process presumably has implications for the fairness of the global trade rules which are determined by the outcome of the negotiations. If parties cannot participate in the negotiations on equal grounds that ensure them equality of opportunity with regard to the aim of the practice, namely finding an agreement based on the interests of the parties, the interests of the disadvantaged parties will also be less reflected in the outcome of trade negotiations.

Position (d) *fair trade is trade the terms of which are based on reciprocity and impartiality*, and Position (e) *fair trade is trade on a level playing field in terms of harmonized standards* can be understood as based on the fairness standard of impartiality. However, I argued that impartiality without qualification is not plausible as an explication of fairness. Accordingly, position e) cannot be defended on the bases of fairness in our understanding, since it would lead to disadvantaging parties that are disadvantaged already even more. To be plausible, both positions would have to be understood in the sense of requiring qualified impartiality. With regard to position d) this means that preferential treatment measures are indeed a requirement of fairness.

With regard to position e) I take it that the global implementation of high ecological standards and higher social standards is a highly plausible demand from the perspective of *ethical trade*. From the perspective of *fair trade*, as a demand of background fairness in the sense of qualified impartiality we need to take into account not only the rules, but also other aspects like the state of technology etc. that disadvantage developing country producers compared to others. Fairness as qualified impartiality accordingly demands certainly that we don't simply impose high standards overnight and require everybody to comply with them, because this would put developing country producers at a severe additional disadvantage, but that we must support developing countries in the process of adjusting to these higher ecological and social standards.

James' position (f) *fair trade is trade the burdens and benefits of which are distributed equally* is a position on *fair trade* in the sense of *outcome fairness*. It focuses on the distributive effects of global trade and only correctively redistributes the burdens and benefits of global trade. This is a strength of the position because it makes it independent of encompassing conceptions of global distributive justice, but it is also a problem because it has problematic implications, among others that it differentiates between the losers of global trade and the losers of domestic trade with regard to their claim to compensation.

Position (i) *fair trade on the level of MNEs considers it as trade that proportionally distributes the burdens and gains of trade throughout their supply chains*, is another position based on the outcome-focused fairness standard of the proportional distribution of burdens and benefits. I argued that it would in principle be possible to construct a rough formula for such a distribution and

suggested how this could look. However, I argued that supply chains don't possess the relevant traits to be considered as cooperative structures in the relevant sense as to trigger the fairness standard of a proportional distribution of burdens and benefits; and that above that, all things considered from a moral perspective assuming position (i) is not advisable because it would undermine important functions of the free market and threaten its welfare benefits.

Finally, let me sum up the findings regarding my aim to develop the basics of a position of my own with regard to the question what fair trade amounts to, particularly in the supply chains of MNEs, and to examine if and how it is justifiable that living wages are a demand of fair trade in the supply chains of MNEs. As we just saw, my analysis led me to refuse the position that fair trade in the supply chains of MNEs requires a proportional distribution of gains throughout the supply chains. However, the discussion of position (j) *fair trade on the level of MNEs is trade that is not involved in exploitation through their supply chains* led to the following findings: position (j) is closely related to unfairness proper because exploitation is a paradigmatic case of unfairness. My understanding of fairness captures the fact that we don't consider exploitative transactions in a normative vacuum, but that background conditions such as severe poverty that disadvantage some with regard to the practice of bargaining the terms of economic exchanges, as measured against basic equality and equality of opportunity, must be included in judgments of fairness. On this basis, I reasoned that beneficial-consensual exploitative transactions are unfair with regard to a combination of the procedural and the outcome dimension, and I explored arguments on these grounds for the claim that living wages are a demand of fair trade in direct economic transactions. I argued that all things considered, harmful-non-consensual exploitative economic transactions are clearly morally unacceptable and must be prohibited. While the argument is much more complicated in the case of beneficial-consensual exploitation, which includes the case of below-subsistence wages, my analysis led to me to conclude that from the perspective of companies offering them, beneficial-consensual exploitative market transactions are decidedly unfair and accordingly unacceptable.

As a claim about unfair trade by MNEs themselves, I examined if the conditions of remedial responsibility offered by Miller apply and we can thus establish that MNEs are remedially responsible for exploitation in their supply chains. I argued that this has to be established in individual cases, and mostly depends on the power the MNE has over the relevant suppliers. In this perspective position (j) is plausible as a position on *ethical trade* by MNEs, but not of unfair trade proper because MNEs are violating general moral duties and not specific fairness duties. However, the analysis led to a plausible argument for MNEs being morally required to ensure living wages being in their supply chains.

The reflections in the context of this thesis have led to a substantial clarification of the ethical foundations of positions in debates on global fair trade, but they leave much to be explored

in further research. My aim of gaining an understanding of the “big picture” regarding debates on fair trade had the unavoidable side-effect that most of the positions on fair trade could not be examined in a detailed way. The clarity of controversies on fair trade could definitely be further enhanced by more in detail examinations of the individual positions on fair trade.

Another closely related issue that does not appear in this thesis is the question what demands fair trade makes on consumers. As this is a highly important question today, research should focus on this question in the future.

Appendix: A Short History and Overview of the Social Fair Trade Movement

The forerunners of the current Fair Trade movement are to be found with informal initiatives in the 1940s and 1950s in the USA. In 1946, Edna Ruth Byler started a grassroots campaign in the United States selling handcrafted products from Puerto Rico out of the trunk of her car. Her idea was to provide sustainable economic opportunities for artisans in developing countries by creating a market for their products. The project was later on to develop into the non-profit fair trade organization „Ten thousand villages“ that is still successfully active today.¹¹¹ In 1949 SERRV International started to develop fair trade supply chains as well. The first formal Fair Trade shop opened in the USA in 1958. In Europe, the British NGO Oxfam started selling handicrafts of Chinese refugees in their shops in the late 1950s. In the context of a more general critique versus the Neo-liberal trade policy of the big multinational corporations, a movement started to emerge in the 1960s alongside campaigns attacking foreign domination and exploitation that were seen to be closely connected. With idols like Nelson Mandela, Julius Nyerere and the Nicaraguan Sandinistas in their back, they promoted the ideals of the right to independence and self-determination and to equitable access to the world's markets. From the beginning, the Fair Trade movement aimed at turning the attention of consumers to the problems caused by conventional trade in the context of the GATT and later WTO system and at introducing changes to its rules.

In 1965, Oxfam created a program called „Helping by Selling“ that sold handicrafts from developing countries in its stores and through mail-order. That program was the first of its kind and a forerunner of a type of organizations that came to be known as *Alternative Trade Organizations* (ATOs) or later on *Fair Trade Organizations*. At about the same time, Dutch groups started to sell cane sugar with the slogan “By buying cane sugar you give people in poor countries a place in the sun of prosperity”. Later on they included handicrafts in their assortment, and in 1967 the importing organization *Fair Trade Original* was established in the Netherlands. Two years later the principles of Fair Trade were brought to the retail sector by the first „World Shop“. The volunteer-run shop sold handicrafts manufactured by poor households to make an additional income and bought from them under „fair conditions“. It was so successful that several similar shops soon went into business in Western European countries, mainly in the Benelux region and in Germany. The sale of products went alongside with background information on the origin of the products, the producers living conditions and the methods of production. Up to now, World- and Fair Trade Shops see the awareness building and mobilization of consumers as one of their main aims.

In the late 1960s, NGOs and individuals in the developing countries themselves started to form organizations to support disadvantaged producers, often helped by and always forming links to the newly established organizations in Europe and the USA. Their common goal was to work

¹¹¹ <http://www.tenthousandvillages.com/>.

towards more equity in international trade. Meanwhile, at the second *United Nations Conference on Trade and Development* (UNCTAD) in Delhi in 1968, the governments of the developing countries started emphasizing the need for more equitable trade relations between the developed and the developing countries. The slogan “Trade not Aid” that was adopted by the conference was promoting a change of perspective away from development aid to focusing on the terms of trade itself.

The aforementioned alternative or fair trade initiatives founded by large development and religious agencies evolved as a response to poverty and disasters in developing countries and were mainly concerned with promoting development through the marketing of craft products. Consequently, this approach is subsumed under the heading of „development trade“. Besides the development trade there was also a variant called „solidarity trade“ in the context of which organizations started to import goods from progressive but politically and economically marginalized countries in the South.

In the first three decades, the products traded by Fair Trade Organizations were almost solely handicrafts. In 1973, the Dutch organization *Fair Trade Original* included the first “fairly traded” coffee from cooperatives of small farmers in Guatemala in their assortment.

Later on the food range was expanded to include products like cocoa, sugar, tea, nuts, dried fruit, rice, spices, wine, fruit juices, etc., while other non-food products, mainly cotton and flowers, were added to the Fair Trade assortment.

Paralelly, the volunteers running and working at the World Shops in different countries started to build stronger networks amongst themselves. In 1984, the first European World Shops Conference took place. It set the beginning of a closer cooperation between volunteers working in World Shops all over Europe to concert their efforts in awareness building and the marketing of their products.

To further develop the networking of the Fair Trade movement in the European context, the European Fair Trade Association (EFTA) was founded in 1987. It was an association of the 11 largest Fair Trade importing organizations in Europe.

Another decisive step in the history of the Fair Trade movement came about a little later with the development of a new means for reaching a broader public: In the same vein as the labels that singled out organic products, a Fair Trade label should be set up to single out products that were produced and traded respecting Fair Trade conditions. This would give any company the possibility to get involved in Fair Trade and open up new distribution channels for Fair Trade products trough making them stand out on the shelves of organic shops and ordinary supermarkets. In 1988, the “Max Havelaar” Fair Trade label was established in The Netherlands. The concept proofed to be successful: within a year, coffee with the label had a market share of almost three percent. In the following years, similar Fair Trade labelling organizations were established in Europe, the USA and Canada.

Meanwhile, as the number of Fair Trade organizations continued growing, the need for some

kind of global umbrella organization became pressing. In 1989, the *International Federation for Alternative Trade* (IFAT) was founded. It links all levels of Fair Trade organizations: national and regional networks, support organizations, importers, retailers, export marketing companies and producer cooperatives and associations. In 2008, it had over 300 member organizations in over 60 countries. In 1994, the American-Canadian *Fair Trade Federation* (FTF) was created as an association of wholesalers, importers and retailers. It links its members to Fair Trade producer cooperatives, provides information, resources and networking opportunities.

In Europe, the networking efforts of the World Shops eventually led to the formal establishment of the *Network of European World Shops* (NEWS!) in 1994. NEWS!, which currently consists of around 3.000 World Shops in 15 European countries, coordinates campaigning activities and fosters the exchange of information and experiences on their work. In 1996, NEWS! established the European World Shops Day that focuses every year on a particular issue related to Fair Trade.

Two years later, in 1998, FLO, IFAT, NEWS! and EFTA created the informal association FINE, its name being composed of the first letters of the four organizations. FINE's goal is to harmonize Fair Trade standards, increase the efficiency of monitoring systems and coordinate campaigning. Parallely it seemed important for the impact of the Fair Trade movement that political decision makers themselves were approached directly. The fourth and maybe foremost aim of FINE is accordingly to lobby for Fair Trade politically. In this field, they profited from the centralized structures of the European Union. In 2004, a *FINE Advocacy Office* was established in Brussels as the lobbying organization of the Fair Trade movement.

As well as with respect to organizations, coordination was urgently needed on the labelling side to bring some structure into the diverse labelling initiatives that had sprouted all over the place since the Max Havelaar label had been launched. To this end, a worldwide Fairtrade Labelling association was set up in 1997. The *Fairtrade Labelling Organization* (FLO) sets international standards for Fair Trade products, certifies their production and audits their trade according to these standards and labels the finished products with their international label. The labelling initiative has proven to be successful for the marketing of Fair Trade products in the mainstream business sector, where over two-thirds of Fair Trade products are nowadays sold.

Another effort in the field of awareness raising was the establishment of a World Fair Trade Day on May 4, 2002 by IFAT, which had taken up of the idea from the European Fair Trade Day launched some years earlier.

Since more and more organizations declared themselves to do „Fair Trade“ and no control mechanisms were in place with respect to organizations, the credibility of the Fair Trade movement was in danger to crumble in the eyes of consumers, politicians and the mainstream business. To tackle this problem, IFAT devised a monitoring system for Fair Trade organizations. In 2004 it launched the *Fair Trade Organization Mark* (FTO Mark) which identifies IFAT members that meet the IFAT standards and the requirements of the monitoring system as registered Fair Trade

Organizations.

Besides these initiatives, in the course of time many national and regional Fair Trade networks have been established all over the world. The biggest regional networks are the *Association Latino Americana de Comercio Justo*, the *Asia Fair Trade Forum* and the *Cooperation for Fair Trade in Africa* (COFTA).¹¹²

In 2007 another networking initiative was founded with the *Fair trade Action Network*. It is a web-based international grassroots network, which links volunteers from many European and North American countries and supports *Fair Trade Town* initiatives.

In terms of market share, FT products are on the raise but are far from being a serious competition to products from conventional trade. The biggest success story in this respect is Switzerland, where FT bananas have a market share of over 50%, flowers over 30% and sugar over 10%. After the US and UK Switzerland has the highest turnover of FT products in absolute terms worldwide (Nicholls/Opal, 169). Sales of FT products have grown an average of 40% per year since 2004. 2007 they reached a turnover of 2.3 billion Euros worldwide. 2007 there were 632 Fair Trade-certified producer organizations in developing countries, representing about 1.5 Mio farmers and workers. FLO estimates that with the inclusion of their families about 7.5 Mio people in developing countries profit directly from the Fair Trade system. By the end of 2015, there were more than 1.65 Mio farmers and workers in Fair Trade certified producer organizations.¹¹³

¹¹² National networks include for example *Ecota Fair Trade Forum in Bangladesh*, *Fair Trade Group Nepal*, *Associated Partners for Fairer Trade Philippines*, *Fair Trade Forum India*, *Kenya Federation for Alternative Trade* (KEFAT), and many more.

¹¹³ <http://www.fairtrade.org.uk/en/what-is-fairtrade/facts-and-figures>.

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